

# Journal of Criminal Law and Criminology

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Volume 102

Issue 3 *Symposium on Overcriminalization*

Article 11

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Summer 2012

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### Recommended Citation

Will Singer, *Judicial Intervention and Juvenile Corrections Reform: A Case Study of Jerry M. v. District of Columbia*, 102 J. CRIM. L. & CRIMINOLOGY 901 (2013).

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# JUDICIAL INTERVENTION AND JUVENILE CORRECTIONS REFORM: A CASE STUDY OF *JERRY M. V. DISTRICT OF COLUMBIA*

Will Singer\*

## I. INTRODUCTION

In January 2007, Vincent N. Schiraldi was the head of the District of Columbia's juvenile corrections agency.<sup>1</sup> By that time, the agency had struggled for decades to comply with a comprehensive consent decree aimed at remedying constitutionally deficient conditions of juvenile confinement.<sup>2</sup> In a meeting with the city administrator, Schiraldi was asked to describe his top three management problems.

"My three biggest management problems right now," Schiraldi said, emphasizing *right now* as if the list might change by the end of the day, "are keeping the staff from beating up my kids, figuring out how to cut down on the sex-for-overtime trade between managers and the line staff, and keeping the court off my back long enough so I can fix this damn place."<sup>3</sup>

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\* J.D., Northwestern University School of Law, 2012; B.A., Oberlin College, 2003. My perspective on these issues is both informed and tainted by my experiences as clerk to the D.C. Council's committee on human services (2005–2006) and chief of budget execution in the Office of the City Administrator (D.C.) (2007–2009).

I owe thanks to Courtney Armour, Natalie Bump, James M. Carter, Paul A. Dawson, James Lindgren, Laura Nirider, Mike Rowe, Marc Schindler, Vinny Schiraldi, and Dan Tangherlini. Special thanks to Molly Ptacek Singer and Leigh B. Bienen.

<sup>1</sup> Schiraldi was then in his second year as director. See Mayor's Order 2005-20, Appointment, Acting Director, Department of Youth Rehabilitation Services, 52 D.C. Reg. 2840 (Mar. 18, 2005).

<sup>2</sup> See Consent Decree, *Jerry M. v. District of Columbia*, C.A. No. 1519-85 (D.C. Super. Ct. July 24, 1986) [hereinafter *Jerry M. Consent Decree*]. The lawsuit remains active today.

<sup>3</sup> Email from Vincent N. Schiraldi to author (Oct. 13, 2010) (on file with the author) (regarding a meeting in 2007); Email from Dan Tangherlini, former City Administrator and Deputy Mayor, to author (Jan. 28, 2011) (on file with the author) (regarding the same meeting).

To unpack that statement is to understand the challenges facing the would-be reformer of a juvenile corrections agency subject to a lawsuit. Keeping children safe is easier to say than to do.<sup>4</sup> The difficulty exists because public sector management demands a great deal of skill<sup>5</sup> and because the political system introduces considerations—such as the imperatives of patronage politics<sup>6</sup> and the popular appeal of promises to get tough on new generations of “radically impulsive, brutally remorseless youngsters”<sup>7</sup>—that sometimes take priority over maintaining safe conditions inside a juvenile correctional facility.<sup>8</sup> Further, any far-reaching reform effort will challenge the entrenched institutional culture that created these unacceptable conditions.<sup>9</sup>

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<sup>4</sup> See RICHARD A. MENDEL, ANNIE E. CASEY FOUND., *NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION* 5, 7 & fig. 2 (2011), available at [http://www.aecf.org/OurWork/JuvenileJustice/~media/Pubs/Topics/JuvenileJustice/DetentionReform/NoPlaceForKids/JJ\\_NoPlaceForKids\\_Full.pdf](http://www.aecf.org/OurWork/JuvenileJustice/~media/Pubs/Topics/JuvenileJustice/DetentionReform/NoPlaceForKids/JJ_NoPlaceForKids_Full.pdf) (stating that “systemic violence, abuse, and/or excessive use of isolation or restraints have been documented” since 2000 in twenty-two states and the District).

<sup>5</sup> See generally, e.g., KENNETH H. ASHWORTH, *CAUGHT BETWEEN THE DOG AND THE FIREPLUG, OR HOW TO SURVIVE PUBLIC SERVICE* (2001) (offering an experienced realist’s practical advice to the newcomer).

<sup>6</sup> See JEROME G. MILLER, *LAST ONE OVER THE WALL: THE MASSACHUSETTS EXPERIMENT IN CLOSING REFORM SCHOOLS* 200 (2d ed., 1998) (referring to county-run training schools, where truants were incarcerated in 1970s Massachusetts, and stating: “The true reason for their existence—to provide patronage jobs for friends and relatives of county commissioners—was clear from a simple scan of staff résumés. The superintendent of one of the schools had degrees in massage and embalming. The superintendent of another came to his position after a stint as a pie salesman. What they had in common was having worked in the campaign of a county commissioner or otherwise endeared themselves to a local politician or state legislator.”).

<sup>7</sup> E.g., Elizabeth Becker, *As Ex-Theorist on Young ‘Superpredators,’ Bush Aide Has Regrets*, N.Y. TIMES, Feb. 9, 2001, at A19 (recounting the effects on public policy of John DiIulio’s juvenile superpredator theory, which DiIulio later conceded was “wrong”).

<sup>8</sup> See, e.g., MILLER, *supra* note 6, at 202 (summarizing a 1971 report on Massachusetts county training schools where delinquent youths were treated as “truly children in bondage, with fewer civil rights than any other group in the Commonwealth, even including inmates in our state prisons” (internal quotations omitted)).

<sup>9</sup> See, e.g., *id.* at 18–19 (stating that Massachusetts reformers successfully introduced effective therapeutic programs into the state’s training schools, but that beatings, isolation, and other hallmarks of institutional culture persisted; ultimately, the reformers decided to close all the state’s training schools). Missouri’s innovative and very effective approach to juvenile corrections is perhaps most remarkable for its rejection of the widely accepted purposes of criminal punishment. See RICHARD A. MENDEL, ANNIE E. CASEY FOUND., *THE MISSOURI MODEL: REINVENTING THE PRACTICE OF REHABILITATING YOUTHFUL OFFENDERS* 6–12 (2010) [hereinafter *MISSOURI MODEL*], available at [http://www.aecf.org/~media/Pubs/Initiatives/JuvenileDetentionAlternativesInitiative/MOModel/MO\\_Fullreport\\_webfinal.pdf](http://www.aecf.org/~media/Pubs/Initiatives/JuvenileDetentionAlternativesInitiative/MOModel/MO_Fullreport_webfinal.pdf)

At their best, juvenile corrections lawsuits require public officials to honor their responsibilities to the troubled children placed in their custody.<sup>10</sup> At their worst, the lawsuits become an interfering distraction, prioritizing technical compliance ahead of true reform.<sup>11</sup> Yet these suits, and calls for major reform, exist because the conditions inside juvenile institutions often fail to reflect the ideals that are the basis of a separate juvenile corrections system.<sup>12</sup>

This Comment seeks to inform the participants in a lawsuit aimed at reforming a juvenile justice system so that they may define a constructive role for the court. To that end, this Comment examines the District of Columbia's juvenile corrections lawsuit over its lifespan—twenty-seven years and counting.<sup>13</sup>

From the outset of this type of suit, the plaintiffs may be entirely correct that conditions of confinement deprive youths of their rights. But the court and parties must continue the inquiry to assess the real problems that make conditions what they are. This is so because the litigation seeks not merely to determine whether conditions fall below constitutional and statutory standards, but more importantly to change the agency's operations so it will meet those standards.<sup>14</sup> Conceivably, the judge or plaintiffs might

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(comparing the effectiveness of other states' juvenile corrections programs with that of Missouri); *id.* at 36–45 (explaining Missouri's philosophy of youth corrections).

<sup>10</sup> See Michael J. Dale, *Lawsuits and Public Policy: The Role of Litigation in Correcting Conditions in Juvenile Detention Centers*, 32 U.S.F. L. REV. 675, 732–33 (1998) (“Lawsuits reduce population, increase staffing, generate reasonable classification systems, improve food, clean up the institution, get staff trained, cause bad staff to get fired, increase medical, dental, and mental health care, improve the children’s education, produce alternative programs, and perhaps most importantly, reduce the number of youngsters who get hurt.”).

<sup>11</sup> See, e.g., JOHN J. DI IULIO, *GOVERNING PRISONS* 248 (1987) (stating that, in the context of lawsuits regarding conditions in adult prisons, “prison officials have been forced to act where court edicts contradicted both correctional judgments and operational reality”); Ross Sandler & David Schoenbrod, *From Status to Contract and Back Again: Consent Decrees in Institutional Reform Litigation*, 27 REV. LITIG. 115, 115–16 (2007) (criticizing the tendency to transform consent decrees from flexible and equitable remedies into rigid contracts).

<sup>12</sup> See, e.g., PATRICIA PURITZ & MARY ANN SCALI, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP’T OF JUSTICE, *BEYOND THE WALLS: IMPROVING CONDITIONS OF CONFINEMENT FOR YOUTH IN CUSTODY*, at xi (1998) (calling litigation a response to well-documented deficiencies in the conditions of confinement).

<sup>13</sup> See *Jerry M. v. District of Columbia*, C.A. No. 1519-85 (D.C. Super. Ct. filed Mar. 1, 1985).

<sup>14</sup> See Dale, *supra* note 10, at 733 (stating that constitutional and statutory constraints will limit the extent of relief ordered in juvenile corrections litigation); see also Alphonse Gerhardstein, *Leveraging Maximum Reform While Enforcing Minimum Standards*, 36 FORDHAM URB. L.J. 9, 16, 21 (2009) (arguing that, whenever cooperation with political and administrative officials is possible, juvenile corrections litigation should extend its focus

believe that operational issues present problems only for the government defendant; this view is correct only if they do not care to implement an effective remedy. The goal of successful implementation introduces a vast universe of practical operational problems that merit the attention of the court and the parties.<sup>15</sup> Yet this Comment will argue that the court's interest in operational problems does not justify judicial micromanagement.

This Comment begins, in Part II, with an overview of the lawsuit and consent decree seeking to reform the secure facilities in the District of Columbia's juvenile justice system. Part III reviews the theoretical framework of "institutional reform litigation," focusing on lawsuits challenging conditions of juvenile and criminal confinement. Much of this literature supposes that litigation can solve problems indirectly, by arousing a "political will" that in turn solves the problem. Political will may be a necessary condition, but it is far from sufficient.

Part IV shows that other considerations are important, too. A wide variety of institutional actors react to lawsuits in ways that create barriers to and opportunities for reform. Institutional actors of particular relevance to this case include agency management, line staff, judges, the media, the legislature, and the chief executive. Part IV considers each of these groups separately. An epilogue to Part IV emphasizes the potential for political considerations to shift in rapid and unexpected ways, testing the durability of hard-earned progress after it has been made. In conclusion, Part V develops the implications for how courts and parties should see their own roles and the purposes of institutional reform litigation.

## II. JUVENILE CORRECTIONS REFORM IN THE DISTRICT OF COLUMBIA

In 1985, plaintiffs representing the District's detained and committed youths filed a class action, *Jerry M. v. District of Columbia*.<sup>16</sup> The

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beyond the minimal adequacy of conditions to promote the adoption of approaches that reduce recidivism).

<sup>15</sup> See Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2-3 (1979) [hereinafter *Forms of Justice*] (stating that implementation of court orders to desegregate public schools "required new procedures for the assignment of students; new criteria for the construction of schools; reassignment of faculty; revision of the transportation systems to accommodate new routes and new distances; reallocation of resources among schools and among new activities; curriculum modification; increased appropriations; revision of interscholastic sports schedules; new information systems for monitoring the performance of the organization; and more" (citations omitted)).

<sup>16</sup> *Jerry M.*, C.A. No. 1519-85 (amended complaint filed Apr. 15, 1986; consent decree entered July 24, 1986). Detained youth are those who are awaiting trial or sentencing; committed youth are those who have been adjudicated delinquent and placed in the District's

plaintiffs alleged that practices inside the District's secure juvenile correctional facilities violated their constitutional and statutory rights.<sup>17</sup> Specifically, the plaintiffs alleged deprivations of their Eighth Amendment right to be free from cruel and unusual punishment,<sup>18</sup> their Fifth Amendment due process rights,<sup>19</sup> and their statutory rights to appropriate care<sup>20</sup> and educational services.<sup>21</sup> Somewhat unusually, *Jerry M.* was filed and has remained in D.C. Superior Court.<sup>22</sup>

After extensive discovery and briefing, the parties agreed to a consent decree based on three general principles: (1) youths should be housed in the least restrictive setting consistent with public safety, their individual needs, and constitutional and statutory requirements; (2) youths should not be held in secure confinement when a community-based placement is suitable; and (3) detained youths placed in secure confinement while awaiting trial should remain there for the shortest possible time.<sup>23</sup> Like the complaint,<sup>24</sup>

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custody for up to two years. *District of Columbia v. Jerry M.*, 571 A.2d 178, 180 n.3, 4 (D.C. 1990) (citing D.C. CODE § 16-2320 (LexisNexis 2001)).

<sup>17</sup> *Jerry M.*, 571 A.2d at 180; see also Ed Bruske, *Suit Decries Youth Home Conditions*, WASH. POST, Mar. 2, 1985, at A1 ("Youths held at the District's facilities for juvenile delinquents are subjected to vermin-infested housing that would not pass fire inspections, as well as beatings from their counselors, inadequate medical attention and insufficient educational programs, according to a lawsuit filed against the city. . .").

<sup>18</sup> Amended Complaint at 53–55, *Jerry M.*, C.A. No. 1519-85 (D.C. Super. Ct. Apr. 15, 1986) [hereinafter *Jerry M. Complaint*].

<sup>19</sup> *Id.* (referencing due process rights to be free from harm, to receive rehabilitative treatment, and to access the courts and counsel); cf. Paul Holland & Wallace J. Mlyniec, *Whatever Happened to the Right to Treatment?: The Modern Quest for a Historical Promise*, 68 TEMP. L. REV. 1791, 1793–94 (1995) (stating that by the mid-1980s the prospects for constitutional protection of juveniles' right to treatment were "drastically limited").

<sup>20</sup> *Jerry M. Complaint*, *supra* note 18, at 53 (citing D.C. CODE §§ 16-2313(b), -2320 (LexisNexis 2001)).

<sup>21</sup> *Id.* (citing 20 U.S.C. §§ 1401–82 (2006) and D.C. CODE §§ 31-401, -403 (LexisNexis 2001)).

<sup>22</sup> See Alison Brill, Note, *Rights Without Remedy: The Myth of State Court Accessibility After the Prison Litigation Reform Act*, 30 CARDOZO L. REV. 645, 651–53 (2008) (explaining why "federal courts [became] the preferred forum for challenging prison conditions" via § 1983 claims).

<sup>23</sup> See *Jerry M. Consent Decree*, *supra* note 2, at 1–2 (stating the decree's general principles); *District of Columbia v. Jerry M.*, 571 A.2d 178, 180–81 (D.C. 1990) (characterizing the discovery and briefing).

<sup>24</sup> *Jerry M. Complaint*, *supra* note 18, at 51–52 (alleging that the District inappropriately confined youths even when public safety and rehabilitative needs did not call for secure confinement); *id.* at 25–26, 36–37, 48–49 (alleging that staff were too few and too poorly trained, creating a climate of violence in juvenile confinement facilities).

these principles recognize the dangers of overconfinement<sup>25</sup> and overcrowding<sup>26</sup> in juvenile correctional facilities.

The consent decree's core provisions followed from its principles. The consent decree empowered a panel of three experts to set a binding cap on the number of youths confined to locked custody and to plan a continuum of community-based alternatives to secure confinement.<sup>27</sup> It required the District to close the notorious Cedar Knoll facility<sup>28</sup> by December 1, 1987, and to obtain the court's permission before constructing additional space for secure rooms.<sup>29</sup> And it prohibited the District from housing more than one child in a cell.<sup>30</sup>

But the consent decree did not stop there. It established a court monitor to track compliance, mediate disputes between the parties, and make recommendations on how to comply with the decree.<sup>31</sup> Other provisions sought to regulate nearly every aspect of the facilities' operations,<sup>32</sup> including:

- *Staffing.* The consent decree mandated training standards for newly hired line staff, created an internal compliance unit, required a minimum ratio of one staff on duty to supervise every ten youths during the daytime, and

<sup>25</sup> On the effects of confining youths unnecessarily, in light of the risk they pose to public safety and their rehabilitative needs, see generally BARRY HOLMAN & JASON ZIEDENBERG, JUSTICE POLICY INST., *THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES* (2006), available at [http://www.justicepolicy.org/images/upload/06-11\\_REP\\_DangersOfDetention\\_JJ.pdf](http://www.justicepolicy.org/images/upload/06-11_REP_DangersOfDetention_JJ.pdf).

<sup>26</sup> On the effects of confining too many youths in a single facility, see generally Sue Burrell, *The Human Impact of Crowding in Juvenile Detention*, 13 J. FOR JUV. JUST. & DETENTION SERVICES 42 (1998), available at [http://www.ylc.org/pdfs/Human\\_Impact\\_of\\_Crowding.pdf](http://www.ylc.org/pdfs/Human_Impact_of_Crowding.pdf).

<sup>27</sup> *Jerry M. Consent Decree*, *supra* note 2, at 2–5 pt. I(B)(1)–(6); see also *Jerry M. v. District of Columbia*, C.A. No. 1519-85 (D.C. Super. Ct. Oct. 9, 1987) (Memorandum Order A) at 6–7 (accepting most of the panel's recommendations and ordering the District to comply).

<sup>28</sup> See, e.g., *Jerry M. Complaint*, *supra* note 18, at 5 (“Cedar Knoll is an antiquated ‘reform school’ whose buildings have become unfit for habitation. . .”).

<sup>29</sup> *Jerry M. Consent Decree*, *supra* note 2, at 7–8 (referring to Cedar Knoll as the “Oak Hill Annex”).

<sup>30</sup> *Id.* at 7–8.

<sup>31</sup> *Id.* at 8–12. The court monitor “shall have access to all D.C. employees[,] . . . all appropriate facilities[, and] all relevant records.” *Id.* at 9.

<sup>32</sup> The consent decree stopped short of setting appropriations. See *id.* at 12 (“The Mayor of the District of Columbia and the District of Columbia Public Schools will take all reasonable steps, employing their utmost diligence, to seek funds sufficient to implement fully the provisions of this Decree.”).

required the District to discipline staff as appropriate while limiting their overtime.<sup>33</sup>

- *Individual Service Plans.* The decree detailed procedures for individualized diagnosis and treatment of educational and behavioral needs.<sup>34</sup>
- *Recreation and Aftercare.* The decree fixed minimum amounts of daily exercise<sup>35</sup> and required meetings about aftercare.<sup>36</sup>
- *Mental Health and Social Services.* The decree specified staff-to-youth ratios and educational qualifications for mental health professionals and social workers.<sup>37</sup>
- *Education.* The decree required full compliance with the federal Individuals with Disabilities Education Act;<sup>38</sup> set different teacher-to-student ratios for regular academic classes, special education classes, and classes for seriously emotionally disturbed youths; required use of the standard D.C. Public Schools curriculum; required an administrative structure consisting of a principal and assistant principal as well as a roster of available substitute teachers; required at least five hours of school each day; and required vocational programming.<sup>39</sup>
- *Discipline.* The decree revised the existing disciplinary code by reducing the maximum punishment from seven to five days of isolation, during which time educational and recreational services must continue.<sup>40</sup>
- *Use of Restraints.* The decree limited the use of restraints by enumerating the circumstances in which a youth could wear leg irons or handcuffs and requiring a standardized written record of every occasion on which restraints were used.<sup>41</sup>

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<sup>33</sup> *Id.* at 13–14.

<sup>34</sup> *Id.* at 14–20. It required, inter alia, a team leader to “supervise the cottage life staff with respect to all areas of the youth’s [individualized service plan].” *Id.* at 9.

<sup>35</sup> *Id.* at 20–21 (requiring “large muscle activity” for a minimum of two hours, including one hour outdoors, weather permitting).

<sup>36</sup> *Id.* at 23–24. Aftercare refers to supervision of the youth after leaving locked custody.

<sup>37</sup> *Id.* at 21–23.

<sup>38</sup> See 20 U.S.C. § 1400 *et seq.* (2006).

<sup>39</sup> *Jerry M. Consent Decree*, *supra* note 2, at 24–27.

<sup>40</sup> *Id.* at 28–30.

<sup>41</sup> *Id.* at 30–32.



- *Environmental Health and Safety.* The decree regulated youths' access to bathrooms and required adherence to standards for food, housekeeping, laundry, waste disposal, vermin control, plumbing, temperature controls, fire safety, and the size of each room.<sup>42</sup>
- *Medical Services and Family/Attorney Contact.* The decree required adequate onsite medical services and access to visits and telephone calls from family or attorneys.<sup>43</sup>
- *Student Handbook.* The decree required the agency to publish all of the youths' rights and facilities' rules in a student handbook, to be distributed to each youth upon arrival.<sup>44</sup>

Throughout the consent decree, provisions fixed deadlines or required the District to develop timetables for achieving compliance.<sup>45</sup> One provision stated that the decree would remain in effect—and thus that court supervision would continue—until the monitor found “sustained and satisfactory implementation and substantial compliance in all areas of the Decree.”<sup>46</sup>

If the parties hoped that the decree's specificity would facilitate compliance, they would be disappointed. During much of the case's history, the government's attempts to comply with the 1986 consent decree were insincere and ineffectual.<sup>47</sup> The District violated even central, straightforward terms. For example, despite the clear mandate to close the Cedar Knoll facility by December 1, 1987, the District continued to operate

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<sup>42</sup> *Id.* at 33–36.

<sup>43</sup> *Id.* at 37–39.

<sup>44</sup> *Id.* at 39–40.

<sup>45</sup> *E.g., id.* at 33 (requiring the District to comply with environmental health standards by August 1, 1988, and to produce a timetable for compliance with all requirements within two weeks of the consent decree taking effect).

<sup>46</sup> *Id.* at 11.

<sup>47</sup> See REAGAN DALY ET AL., VERA INST. OF JUSTICE, CAPITAL CHANGE: A PROCESS EVALUATION OF WASHINGTON, DC'S SECURE JUVENILE PLACEMENT REFORM 4 (2011), available at <http://www.vera.org/download?file=3191/Capital-Change-process-evaluation-DC-FINAL2.pdf>; Holland & Mlyniec, *supra* note 19, at 1824 (calling the District's juvenile justice system “an abject failure” despite nearly a decade of court intervention).

the facility—even reopening portions that it had closed<sup>48</sup>—until an act of Congress barred any appropriations for its operation after June 1, 1993.<sup>49</sup>

At various moments, a frustrated court issued remedial orders to enforce the decree,<sup>50</sup> attempted to define the District’s obligations in further detail than the decree specified,<sup>51</sup> found the District in civil contempt,<sup>52</sup> awarded attorneys’ fees to plaintiffs,<sup>53</sup> levied several million dollars in fines for noncompliance with the decree and remedial orders,<sup>54</sup> appointed a series

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<sup>48</sup> See Patrice Gaines-Carter, *Cedar Knoll Population Up*, WASH. POST, Dec. 6, 1985, at B1 (stating that, in the preceding five months, “the number of youths there has quadrupled and officials are reopening cottages”).

<sup>49</sup> Keith A. Harriston, *D.C. to Close Cedar Knoll by May 31*, WASH. POST, Apr. 1, 1993, at A28 (referencing an act introduced by Rep. Steny H. Hoyer (D-Md.), whose district included the facility); News Brief, *D.C. Empties Detention Center*, WASH. POST, June 2, 1993, at D5. Congress had previously defunded all appropriations for the facility known as Cedar Knoll, but the District renamed the reopened cottages “Oak Hill Annex” and kept operating them. LISA FELDMAN, MICHAEL MALES & VINCENT SCHIRALDI, BUILDING BLOCKS FOR YOUTH, A TALE OF TWO JURISDICTIONS: YOUTH CRIME AND DETENTION RATES IN MARYLAND AND THE DISTRICT OF COLUMBIA 11 (2001), available at [http://www.justicepolicy.org/uploads/justicepolicy/documents/tale\\_of\\_2.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/tale_of_2.pdf).

<sup>50</sup> The first judge presiding over *Jerry M.* issued eighteen remedial orders, labeled from A to R, between 1986 and 1994; his successor labeled such orders with numbers, thus sparing the District “the embarrassment of receiving Memorandum Order Z.” Holland & Mlyniec, *supra* note 19, at 1823 n.232. “There have been orders to remedy violations of the consent decree in medical care, education, environmental issues, physical abuse, lack of programming, and overcrowding, to name a few.” Michael White et al., Symposium, *Systemic Critique and Transformation*, 3 D.C. L. REV. 403, 412 (1995) (quoting Donna Wulkan, co-counsel to the *Jerry M.* plaintiffs).

<sup>51</sup> District of Columbia v. *Jerry M.*, 571 A.2d 178, 180 (D.C. 1990) (reversing, “with some reluctance,” trial court orders that exceeded the scope of the consent decree). The court invalidated orders that the District construct smaller, decentralized facilities to replace its existing secure institutions; place no more than sixty committed youths in secure facilities; and institute wide-ranging management reforms. *Id.* at 179–80, 189–90.

<sup>52</sup> *Id.* at 192 (affirming the trial court’s finding of contempt). The District “failed to comply with practically every provision of the Decree,” including mandates to close Cedar Knoll, reduce the number of youths in secure confinement, and end the practice of housing more than one youth in a single room. *Id.* at 184 n.16 (quoting the trial court’s Memorandum Order D, dated November 28, 1988).

<sup>53</sup> District of Columbia v. *Jerry M.*, 580 A.2d 1270, 1273, 1282 (D.C. 1990).

<sup>54</sup> E.g., *Jerry M. v. District of Columbia*, C.A. No. 1519-85 (D.C. Super. Ct. April 15, 2004) (Order VIII) at 21–22 (establishing fines of \$1,000 per day for failure to train staff in making educational diagnoses, \$1,000 per day for failure to convene treatment teams to develop and review educational plans, \$1,000 per day for failure to fully implement a policy requiring treatment team leaders to supervise line staff in all areas of a youth’s treatment plan, and \$5,000 per day for failure to establish a pre-release unit outside the perimeter fence at Oak Hill); see also Nancy Lewis, *Judge’s Costly Ruling*, WASH. POST, April 22, 1994, at D1 (reporting the court’s imposition of a \$1,000 fine per youth per day for overcrowding at juvenile institutions). In imposing the fines rather than appointing a receiver, the court

of court monitors and special masters,<sup>55</sup> attempted to appoint a receiver in charge of youth offenders' education,<sup>56</sup> and even summoned the mayor to a "closed-door meeting about the District's trouble-plagued juvenile facilities."<sup>57</sup>

None of these actions resulted in compliance with the decree.<sup>58</sup> In 2004, the court monitor gave a "dispiriting" assessment in his fifty-second (and final) report: "Unfortunately, much of the halting, stutter-step, movement toward compliance seen for much of the past eighteen years continued."<sup>59</sup> The plaintiffs asked the court to place the entire juvenile justice agency in receivership.<sup>60</sup> Before the court ruled on the motion—and with every indication that the court intended to grant it<sup>61</sup>—the parties agreed instead to appoint a new special arbiter with both expanded powers to

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hoped that "with the right incentives[,] compliance may be achieved without substituting a court officer for government officials." *Id.* at D5 (quoting Judge Ricardo M. Urbina).

<sup>55</sup> *E.g.*, White et al., *supra* note 50, at 413 (noting the existence, at the time, of a court monitor and separate special masters for suicide prevention, and development of a continuum of care).

<sup>56</sup> The D.C. Court of Appeals overturned the trial court's order appointing an educational receiver. *District of Columbia v. Jerry M.*, 738 A.2d 1206, 1213–14 (D.C. 1999) (holding that the trial court abused its discretion in appointing the receiver because it considered only a single factor—"[t]he District's abysmal response to its mandates for such a protracted period of time"—without making findings with respect to other relevant factors, including the prospects for better compliance under newly appointed management).

<sup>57</sup> Nancy Lewis, *Kelly to Skip Meeting on Youth Facilities*, WASH. POST, Aug. 25, 1993, at B5 (reporting that Judge Urbina invited the mayor, but also required the director of the Department of Human Services to attend). Mayor Sharon Pratt (née Kelly) declined the invitation, citing her concern for the separation of powers and her "ability as chief executive to function through executive agencies." *Id.* The director, Vincent C. Gray, became mayor in 2011 and surely has an opinion on the separation of powers.

<sup>58</sup> See AUSTIN A. ANDERSEN, OFFICE OF THE INSPECTOR GENERAL (D.C.), OIG No. 03-0014YS, YOUTH SERVICES ADMINISTRATION PART ONE: OAK HILL YOUTH CENTER 22 (Mar. 30, 2004) (on file with the Journal of Criminal Law and Criminology) (stating that "many of the same types of problems that resulted in the 1986 lawsuit against the District and the subsequent Decree . . . still exist 17 years later," and reporting that, as of October 2003, the District "still was not in full compliance with approximately one-third of the 185 provisions of the Decree").

<sup>59</sup> Fifty-Second Report of the Monitor at 1–2, *Jerry M.*, C.A. No. 1519-85 (D.C. Super. Ct. Oct. 8, 2004).

<sup>60</sup> See *Jerry M.*, C.A. No. 1519-85 (D.C. Super. Ct. May 13, 2004) (order approving memorandum of agreement providing for a special arbiter) at 1.

<sup>61</sup> Judge Herbert B. Dixon Jr. issued a scathing order the previous month, concluding: "It is bewildering to this member of the court that over three years after the renewed pledges to achieve compliance with the Consent Decree . . . defendants continue to address fundamental provisions of the Consent Decree in isolation, with a flurry of attention prior to or following court involvement." *Jerry M.*, C.A. No. 1519-85 (D.C. Super. Ct. Apr. 15, 2004) (Order VIII) at 20.

monitor implementation of the decree and new authority to make a binding recommendation to the court on whether a receiver should run the entire youth corrections agency.<sup>62</sup>

At the same time, the legislature reorganized the juvenile corrections agency by making it a cabinet-level agency whose director reported directly to the mayor.<sup>63</sup> Together, the new agency and special arbiter constituted a last-ditch effort that appeared likely, at best, to postpone receivership.<sup>64</sup> Receivership appeared not only an inevitable outcome of the litigation, but the only way to improve the District's juvenile correctional institutions; a plaintiff's expert even advised the agency's new director to plan for it.<sup>65</sup>

And then something miraculous happened.<sup>66</sup> After decades of recalcitrance, the District—pushed by pressure from the public and politicians, and pulled by a team of reform-oriented administrators—made the kind of dramatic progress that had eluded consent decrees,

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<sup>62</sup> *Jerry M.*, C.A. No. 1519-85 (D.C. Super. Ct. May 13, 2004) (order approving memorandum of agreement providing for a special arbiter). The special arbiter, Grace M. Lopes, had previously served as the general counsel to Mayor Anthony A. Williams. Thus, the court monitor wrote in his final report that “the appointment of a Special Arbiter . . . who has worked with the current Mayor, and who, therefore, will have access to him, and his considerable authority, when necessary, are both indications that the future may offer more promise than the past.” Fifty-Second Report of the Monitor, *supra* note 59, at 1.

<sup>63</sup> See Department of Youth Rehabilitation Services Establishment Act of 2004, 52 D.C. Reg. 2025, D.C. Law 15-335 (Apr. 12, 2005) (codified at D.C. CODE §§ 2-1515.01–2-1515.10 (LexisNexis 2001)). Previously, the agency had been known as the Youth Services Administration (YSA), a division of the larger Department of Human Services. Today it is the Department of Youth Rehabilitation Services (DYRS). See discussion *infra* Part IV.A.2.

<sup>64</sup> See Theola S. Labbé, *Acting Chief Articulates His Juvenile Justice Plan*, WASH. POST, Feb. 26, 2005, at B3 (“Peter J. Nickles, an attorney for juveniles in the *Jerry M.* Consent Decree, testified [to the city council] that Schiraldi’s nomination and the creation of the Cabinet-level Youth Rehabilitation Services Department were reasons he had not pushed for the District’s juvenile justice system to be put into receivership . . . . ‘If it’s not done this time, there won’t be any other option but to take the system away from the District,’ Nickles said.”). Nickles was later appointed the District’s attorney general, a position he held from 2008 to 2010. See *infra* text accompanying note 368.

<sup>65</sup> See Vincent N. Schiraldi, Remarks to the National Academy of Sciences, Committee on Assessing Juvenile Justice (Oct. 12, 2010), at 2 (on file with the author) (stating that Paul DeMuro, a veteran of several reform efforts nationwide and the *Jerry M.* saga, believed that receivership was inevitable and advised Schiraldi to “develop a strategy to get appointed Receiver because that was the only way we’d ever fix this place”) [hereinafter Remarks].

<sup>66</sup> See HANNAH ARENDT, *THE HUMAN CONDITION* 178 (2d ed. 1998) [hereinafter *HUMAN CONDITION*] (“The new always happens against the overwhelming odds of statistical laws and their probability, which for all practical, everyday purposes amounts to certainty; the new therefore always appears in the guise of a miracle. The fact that man is capable of action means that the unexpected can be expected from him, that he is able to perform what is infinitely improbable.”).

memorandum orders, court monitors, and contempt findings. Some of the changes were programmatic, such as the District's full integration of therapeutic treatment with the educational programming for youths in secure confinement.<sup>67</sup> Other changes were more concrete: the District met a statutory deadline to replace the dilapidated Oak Hill Youth Center with the state-of-the-art New Beginnings Youth Development Center, a facility where therapeutic principles "are embodied both in the programming and the physical environment."<sup>68</sup>

Though the lawsuit remains active, there is no denying that the District's juvenile correctional facilities became vastly more humane in a relatively short time.<sup>69</sup> By December 2007, the plaintiffs were so encouraged by the agency's improvements that they withdrew their motion to appoint a receiver.<sup>70</sup> The District even became a model of reform for other jurisdictions with troubled juvenile correctional systems.<sup>71</sup>

If juvenile justice reform can happen in the District of Columbia, it can happen anywhere.<sup>72</sup> This Comment examines the interaction between the lawsuit and actual reform. From the perspectives of several role-players with distinct interests, this Comment demonstrates that overly abstract views of institutional reform litigation gloss over complex practical challenges of the highest importance. The District's frustrating experience of judicially driven efforts suggests that this case study can illuminate some of the real obstacles to reform and ways in which court intervention addressed or ignored those obstacles. Finally, the District's tiny scale

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<sup>67</sup> DALY ET AL., *supra* note 47, at 16.

<sup>68</sup> *Id.* at 15; *see also* Omnibus Juvenile Justice Act of 2004, § 1102, 52 D.C. Reg. 1188, D.C. Law 15-261 (effective Mar. 17, 2005) (codified at D.C. CODE § 24-941 (LexisNexis 2001)) (establishing a statutory mandate to close Oak Hill).

<sup>69</sup> Vincent N. Schiraldi, Op-Ed, *In D.C., A Promise Kept in Juvenile Justice*, WASH. POST, Jan. 31, 2010, at C5 (quoting plaintiffs' counsel's 2008 assessment that DYRS "has made more progress toward achieving the goals of the Consent Decree in the past three years than we had seen in the previous 20 years of this lawsuit").

<sup>70</sup> *E.g.*, DALY ET AL., *supra* note 47, at 4, n.15.

<sup>71</sup> *See, e.g.*, Radio: Robert Wildeboer, *Inside and Out: Building a New Prison Culture in D.C.* (WBEZ 91.5 FM broadcast June 16, 2010), *available at* <http://www.wbez.org/series/inside-and-out> (audio recording and written transcript) (examining the District's reform effort for lessons applicable to Illinois).

<sup>72</sup> Over the course of its involvement in a host of institutional reform lawsuits, which date as far back as 1974 and include seven that are active today, the District has earned a reputation for being impossible to reform. *See, e.g.*, Mike DeBonis, *Getting the Courts to Stop Governing D.C.*, WASH. CITY PAPER (Jan. 15, 2010), <http://www.washingtoncitypaper.com/articles/38334/getting-the-courts-to-stop-governing-dc>; *see also infra* note 162 (summarizing the District's unsuccessful attempt to terminate the suits in 2010).

narrows the number of factors bearing on the opportunities and barriers that may also exist in other states (notwithstanding the unwieldy length of this Comment).<sup>73</sup>

### III. THE IDEAS IN THE BACKGROUND

In the abstract, judicial intervention seems like an appealing route to reform. Institutional reform litigation presents courts with a variety of available remedies that might be appropriate, depending on the suit's context.<sup>74</sup> Accordingly, this Part begins by briefly mentioning modern tenets of juvenile corrections reform. This Part then proceeds to consider evolving theories of institutional reform litigation, with an eye towards prisons and juvenile facilities.

#### A. OVERVIEW OF JUVENILE CORRECTIONS REFORM

Juvenile corrections exists in tension with the adult prison system. Juvenile justice systems are creatures of Progressive Era statutes growing from a belief that the state's interest in rehabilitating delinquent juveniles is fundamentally different from its need to punish hardened adult criminals.<sup>75</sup> Yet comparisons with the adult system are inevitable, and the reemergence of the notion that serious offenders should be punished severely no matter their age has returned with profound effects on juvenile justice.<sup>76</sup>

All too often, incarcerated youths are subjected to conditions that are difficult, if not brutal. Incarcerated youths may suffer beatings from staff or other youths.<sup>77</sup> Corporal punishment may be rendered against a youth who

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<sup>73</sup> Cf. White et al., *supra* note 50, at 418 (expressing Jerome Miller's belief that "reform should not be all that difficult," particularly in the District, because there are relatively few people in the juvenile justice system and because institutions are expensive to operate compared to community-based alternatives to incarceration).

<sup>74</sup> See OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* 86–91 (1978) [hereinafter *CIVIL RIGHTS INJUNCTION*] (arguing that courts should use the remedy appearing most likely to succeed under the circumstances, instead of disfavoring equitable remedies unless there is no adequate remedy at law).

<sup>75</sup> *In re Gault*, 387 U.S. 1, 14–16 (1967); see also David S. Tanenhaus & Steven A. Drizin, "Owing to the Extreme Youth of the Accused": *The Changing Legal Response to Juvenile Homicide*, 92 J. CRIM. L. & CRIMINOLOGY 641, 645–46 (2002) (describing the origins of the Illinois Juvenile Court, the first in the nation). To the extent that juvenile court acts create statutory rights, they can impose higher standards on the conditions of confinement than the minimal Eighth Amendment standards.

<sup>76</sup> See, e.g., Tanenhaus & Drizin, *supra* note 75, at 641–42 (referencing the contribution of rhetoric about unrepentant juvenile "superpredators" to the limits placed on juvenile court jurisdiction in the 1990s).

<sup>77</sup> Interviews conducted in 2003 of a nationally representative sample found that 40% of youths in locked custody reported being afraid of being physically attacked by someone,

acts out<sup>78</sup> or against an entire unit collectively if one member acts out.<sup>79</sup> Youths may be put on “lockdowns,” in which they are confined to the isolation of their rooms for hours at a time, either as a punishment or for administrative convenience.<sup>80</sup>

While improving the conditions of confinement is certainly on the agenda, it is not the top priority for some leading juvenile justice reformers.<sup>81</sup> Instead, “[t]he most urgent need is to reduce our wasteful, counterproductive overreliance on incarceration and detention, and instead to redirect resources into proven strategies that cost less, enhance public safety, and increase the success of youth who come in contact with the juvenile courts.”<sup>82</sup> In other words, this approach involves keeping court-involved youths out of secure confinement except when they truly belong there.

For youths who appropriately belong in secure confinement, reformers seek to create environments focused on rehabilitation; Missouri has

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27% feared attacks from staff, and 25% from other youths. ANDREA J. SEDLAK & KARLA S. MCPHERSON, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, CONDITIONS OF CONFINEMENT: FINDINGS FROM THE SURVEY OF YOUTH IN RESIDENTIAL PLACEMENT, 1–2, 7 tbl.5 (May 2010), available at <https://www.ncjrs.gov/pdffiles1/ojjdp/227729.pdf>. With respect to the District, see, e.g., Barton Gellman, *Abuse by Staff is Reported at Oak Hill*, WASH. POST, Nov. 3, 1989, at A1 (reporting that serious violence did not appear to be routine, but that incidents created a climate where “violence is feared and expected” by youths and staff alike).

<sup>78</sup> Gellman, *supra* note 77 (reporting that an organized group of staff beat misbehaving youths on various occasions using “a brick, a knife, metal implements, a chair, milk cartons, and their fists”).

<sup>79</sup> E.g., Benjamin Weiser, *Youth Facility Policy, Reality Clash*, WASH. POST, Oct. 26, 1985, at A1 [hereinafter *Youth Facility Policy*] (stating that staff administered “a hideously painful punishment” to an entire unit of youths for two hours because “somebody had thrown salt into somebody’s hair in the dining room”).

<sup>80</sup> E.g., White et al., *supra* note 50, at 415 (stating that at Oak Hill, lockdowns could last up to seven hours at a time, either for disciplinary reasons or because there are not enough staff on the unit).

<sup>81</sup> E.g., MENDEL, *supra* note 4, at 28–37 (listing six priorities for juvenile justice reform, of which only the fifth priority pertains to conditions of confinement). The Annie E. Casey Foundation, a national advocacy organization that also has major initiatives in education and child welfare, observed that “among all of the policy areas affecting vulnerable children and families, juvenile justice probably suffers the most glaring gaps between best practice and common practice, between what we know works and what our public systems most often do on our behalf.” ANNIE E. CASEY FOUND., ISSUE BRIEF: REFORM THE NATION’S JUVENILE JUSTICE SYSTEM 1 (Jan. 2009) [hereinafter ANNIE E. CASEY FOUND., ISSUE BRIEF], available at [http://www.aecf.org/~media/PublicationFiles/Juvenile\\_Justice\\_issuebrief3.pdf](http://www.aecf.org/~media/PublicationFiles/Juvenile_Justice_issuebrief3.pdf).

<sup>82</sup> ANNIE E. CASEY FOUND., ISSUE BRIEF, *supra* note 81, at 1.

developed a system that epitomizes this approach.<sup>83</sup> In the “Missouri model,” secure facilities are small and homelike settings, rather than large, impersonal institutions.<sup>84</sup> Staff members maintain safety and order by developing relationships with youths, instead of through extensive use of isolation and overreliance on sophisticated surveillance technology.<sup>85</sup> More generally, the role of staff goes far beyond mere supervision and seeks to facilitate the positive development of youths.<sup>86</sup>

Though these approaches are very different from traditional incarceration practices, they do not represent a set of brand new ideas but instead advocate a “return to the roots” of juvenile justice systems.<sup>87</sup> Likewise, conditions litigation in this field seeks to correct the abuses of wayward institutions and to restore the rehabilitative purpose envisioned at the time juvenile justice systems were created by statute.<sup>88</sup>

#### B. INSTITUTIONAL REFORM LITIGATION IN THEORY

Like institutional reform lawsuits themselves, scholarly consideration of this subject is only a few decades old.<sup>89</sup> As this Part will show, the early scholarship sought to develop a framework for understanding late-twentieth century judicial interventions that used wide-ranging injunctive remedies to address public policy problems.<sup>90</sup> As these lawsuits proliferated, backlash followed; critics questioned both the efficacy and the legitimacy of the

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<sup>83</sup> See, e.g., Mark Soler, Dana Schoenberg & Marc Schindler, *Juvenile Justice: Lessons for a New Era*, 16 GEO. J. ON POVERTY L. & POL’Y 483, 525 (2009).

<sup>84</sup> MENDEL, MISSOURI MODEL, *supra* note 9, at 2.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> Jeffrey M. Y. Hammer, Hon. Curtis Heaston & Diane N. Walsh, *Denying Child Welfare Services to Delinquent Teens: A Call to Return to the Roots of Illinois’ Juvenile Court*, 36 LOY. U. CHI. L.J. 925, 929 (2005) (citing Julian W. Mack, *The Chancery Procedure in the Juvenile Court*, in *THE CHILD, THE CLINIC AND THE COURT* 310, 310 (1925)) (discussing the approach of the early Illinois Juvenile Court, which looked beyond simple adjudication of guilt to determine and address the reasons why a youth offended).

<sup>88</sup> See, e.g., *U.S. v. Alsbrook*, 336 F. Supp. 973, 974–75, 979 (D.D.C. 1971) (finding that overcrowded conditions at a D.C. correctional center violated the essentially rehabilitative purpose of the Youth Corrections Act, 18 U.S.C. §§ 5010–16 (repealed by Pub. L. 98-473, 98 Stat. 2027 (Oct. 27, 1984)), which provided separately for low-level adult offenders under age twenty-two).

<sup>89</sup> Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 552, 564 (2006) (dating institutional reform litigation to the 1955 decision in *Brown v. Board* and scholarly attention to the “canonical treatments” of the topic by Abram Chayes and Owen Fiss in the 1970s).

<sup>90</sup> See generally, e.g., FISS, CIVIL RIGHTS INJUNCTION, *supra* note 74 (considering the civil rights injunction as a device for making policy in various contexts).



lawsuits.<sup>91</sup> Institutional reform lawsuits, especially over jails and prisons, fell out of newspapers and law journals alike; however, they had not disappeared, but rather changed in ways scholars generally failed to appreciate.<sup>92</sup> Some contemporary defenders emphasize litigation's ability to break up a malevolent institutional order.<sup>93</sup> While having some merit, this perspective glosses over the difficulty of building a new institutional culture because it supposes that reform will happen as soon as politicians want it to happen.<sup>94</sup> As other defenders have argued, understanding the actual and often peculiar bureaucratic and political factors in play is a task of the highest importance.<sup>95</sup>

### *I. Origins of Institutional Reform Litigation*

First, it will be useful to summarize the arc of institutional reform litigation and its antecedent, public law litigation. "Public law litigation" is Professor Chayes's term, referring broadly to cases where "the subject matter of the lawsuit is not a dispute between private individuals about private rights, but a grievance about the operation of public policy."<sup>96</sup> These suits persist after the court has ordered a remedy; the court remains involved to ensure that compliance with an injunction or decree honors the public rights that have been violated.<sup>97</sup> Professor Chayes broadly applied

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<sup>91</sup> E.g., John J. DiIulio, Jr., Conclusion: *What Judges Can Do to Improve Prisons and Jails*, in *COURTS, CORRECTIONS, AND THE CONSTITUTION* 281, 291, 317 (John DiIulio ed., 1990) [hereinafter *What Judges Can Do*] (granting that prison litigation contributed to improvements in prison conditions, but suggesting that the improvements would have happened in a less disruptive manner without court intervention); *id.* at 319–20 (arguing that judicial intervention in prison administration is inappropriate).

<sup>92</sup> See Schlanger, *supra* note 89, at 553–57 (refuting the conventional wisdom that prison litigation withered during the 1980s and died in 1996 with passage of the Prison Litigation Reform Act).

<sup>93</sup> E.g., Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1016 (2004) (understanding "public law cases as core instances of 'destabilization rights'—rights to disentrench an institution that has systematically failed to meet its obligations and remained immune to traditional forces of political correction").

<sup>94</sup> See *id.* at 1073 (supposing that "experimentalist" approaches to crafting remedies in institutional reform suits will expose noncompliance, bringing broader scrutiny to institutions and spurring political branches to intervene).

<sup>95</sup> See Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639, 646 (1993) ("Too often, scholars and advocates ignore [the political context surrounding the institutions subject to litigation] and offer overarching generalizations about litigation's impact and potential.").

<sup>96</sup> Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1302 (1976).

<sup>97</sup> *Id.*

his term to include suits enforcing public rights against the government (such as school desegregation cases and suits over substandard conditions in prisons or mental institutions), as well as those enforcing public rights against private parties (including antitrust, corporate governance, consumer protection, and housing discrimination).<sup>98</sup> In the course of these suits, the judge assumes an extraordinary role in ordering complex injunctive relief and supervising its implementation by the defendant.<sup>99</sup>

Institutional reform litigation is a subset of public law litigation in which plaintiffs, typically joined as a class, seek enforcement of their public rights against the government.<sup>100</sup> In the prototypical decision of *Brown v. Board of Education*, the Court's remand gave district courts broad license to enter orders and decrees that would desegregate public schools.<sup>101</sup> In one view, which is not terribly troubled by the separation of powers and federalism objections raised against it, a heroic judge can reform the system by ordering the policies that politicians were afraid to make.<sup>102</sup> In the early 1970s, federal courts began entering the first orders broadly aimed at reforming conditions in adult prisons and jails.<sup>103</sup> Though falling short of the most ambitious reform goals, these suits helped improve some of the most dramatically deficient conditions; they also prompted the professionalization and bureaucratization of prison systems.<sup>104</sup> Some other suits sought to improve juvenile facilities, but they were fewer in number; substandard conditions in these facilities persisted in many states.<sup>105</sup>

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<sup>98</sup> *Id.* at 1284. For a critique of the increasing use of federal criminal prosecutions to force corporate defendants to undertake internal reforms, see Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853 (2007).

<sup>99</sup> FISS, CIVIL RIGHTS INJUNCTION, *supra* note 74, at 26–27; Chayes, *supra* note 96, at 1301.

<sup>100</sup> Note, *Implementation Problems in Institutional Reform Litigation*, 91 HARV. L. REV. 428, 428 (1977).

<sup>101</sup> See, e.g., Schlanger, *supra* note 89, at 552 (quoting *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294, 301 (1955)); cf. *Banning v. Looney*, 213 F.2d 771 (10th Cir. 1954) (per curiam), *cert. denied*, 348 U.S. 859 (1954) (“Courts are without power to supervise prison administration or to interfere with the ordinary prison rules or regulations . . . . No authorities are needed to support th[is] statement[.]”).

<sup>102</sup> See FISS, CIVIL RIGHTS INJUNCTION, *supra* note 74, at 90, 93; Fiss, *Forms of Justice*, *supra* note 15, at 2.

<sup>103</sup> Schlanger, *supra* note 89, at 552 n.4.

<sup>104</sup> Sturm, *supra* note 95, at 665–69, 674.

<sup>105</sup> *Id.* at 698.

## 2. Backlash Against Institutional Reform Litigation

The golden age of institutional reform litigation did not last long before commentators counterattacked against the suits.<sup>106</sup> First, these critics charged that court supervision usurped the executive's authority to manage prisons and the legislature's authority to set standards and appropriate funds.<sup>107</sup> As a practical matter, there is almost no check or restraint on the power assumed by judges and masters.<sup>108</sup> If they seek to avoid contempt, the executive and legislature have no choice but to comply with orders to build new facilities, hire more staff, or create procedural rights for inmates.<sup>109</sup> A consent decree is unappealable by definition, since both parties agreed to the court's entry of the settlement; likewise, a master's determinations are effectively final because the trial court rarely reverses its own representative, who defendants may not wish to antagonize.<sup>110</sup> In addition, critics charged that federal judges conducting sweeping reviews of the management of state institutions had exceeded the bounds of federalism and ignored the separation of powers principle.<sup>111</sup> But as part of a broader defense of prison litigation, some argued that judicial policymaking is a necessary consequence of the courts' legitimate adjudication of Eighth Amendment rights and the concomitant implementation of remedies.<sup>112</sup>

Even if we assume that court intervention is legitimate, there may be several reasons to doubt its effectiveness.<sup>113</sup> Whether courts have the right

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<sup>106</sup> Sabel & Simon, *supra* note 93, at 1037 (referring to a "backlash" in the late 1980s); Schlanger, *supra* note 89, at 564.

<sup>107</sup> *E.g.*, DILULIO, GOVERNING PRISONS, *supra* note 11, at 229.

<sup>108</sup> A judge's order can only be appealed (if at all) to another judge. The Prison Litigation Reform Act, discussed *infra*, underscores the power legislatures have to stop the flow of institutional reform lawsuits.

<sup>109</sup> *See, e.g.*, Anthony DiSarro, *Six Decrees of Separation: Settlement Agreements and Consent Orders in Federal Civil Litigation*, 60 AM. U. L. REV. 275, 317–18 (2010) (noting that a consent decree, unlike a settlement, is an order of the court; the court's interest in enforcement is independent of the parties' interests, legal or otherwise).

<sup>110</sup> *See* Clair A. Cripe, *Courts, Corrections, and the Constitution: A Practitioner's View*, in COURTS, CORRECTIONS, AND THE CONSTITUTION, *supra* note 91, at 268, 274–75.

<sup>111</sup> *See, e.g.*, John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CALIF. L. REV. 1121, 1140–41 (1996). Of course, in the District of Columbia the principles of federalism hardly constrain the federal courts. *See, e.g.*, Charles J. Ogletree, Jr., *Judicial Activism or Judicial Necessity: The D.C. District Court's Criminal Justice Legacy*, 90 GEO. L.J. 685, 686 (2002).

<sup>112</sup> *See* MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE 380–81 (1998).

<sup>113</sup> Alternatively, one could simply assume that litigation is effective. *See* GORDON SILVERSTEIN, LAW'S ALLURE 21 (2009) (charging that policy entrepreneurs, politicians, and lawyers act on such an assumption without empirical evidence).

tools to change complex institutions—or use the tools they have in the right ways—is a matter of some controversy. John DiIulio charged that a judge sitting in chambers is helpless to implement change or even understand the basic operations of a distant institution.<sup>114</sup> Even the assistance of special masters is not helpful if courts make poor use of them—for example, by appointing as masters individuals (often trained as lawyers) who lack correctional expertise.<sup>115</sup> Ideally, judges themselves are selected because they are outstanding lawyers, not strong managers, and so the special master might lack sound guidance.<sup>116</sup> Lastly, ongoing court supervision entails high costs in attorney fees and masters' expenses, which can generate skepticism about whether the attorneys and masters are interested in solving problems or in perpetuating their incomes.<sup>117</sup>

With respect to prison litigation, these counterattacks on legitimacy and effectiveness—combined with the perceived avalanche of prisoners' meritless pro se suits—led Congress to enact the Prison Litigation Reform Act (PLRA).<sup>118</sup> Although the PLRA facilitated the dismissal of existing prison lawsuits and frustrated the initiation of new ones, prison litigation endures.<sup>119</sup> Notably, the PLRA applies to litigation over conditions in juvenile justice facilities, even though juvenile lawsuits have not flooded the courts to any comparable extent.<sup>120</sup>

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<sup>114</sup> See DI IULIO, GOVERNING PRISONS, *supra* note 11, at 229. For a vigorous criticism of DiIulio's views on judicial intervention and ideal prison management, see Sturm, *supra* note 95, at 657–60.

<sup>115</sup> See Cripe, *supra* note 110, at 274 (conceding that special masters typically have other skills—including an ability to mediate conflicts—that can have value in implementation).

<sup>116</sup> See *id.* at 274. In addition to management skills, successful implementation of an institutional reform order requires an understanding of local political sensibilities—another quality that judges might not have. See Sturm, *supra* note 95, at 646.

<sup>117</sup> See DI IULIO, GOVERNING PRISONS, *supra* note 11, at 216.

<sup>118</sup> Title VIII of Pub. L. No. 104-134, 110 Stat. 1321–66 (1996); see Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America's Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U. PA. J. CONST. L. 139, 141 (2008); see also Schlanger, *supra* note 89, at 556 (stating that progressive policymakers incorrectly assumed that prison litigation had declined before the PLRA, so that there was diminished value in continuing prison litigation).

<sup>119</sup> Schlanger, *supra* note 89, at 554–55. Even after the PLRA, modern-day consent decrees involving juvenile facilities can be just as broad as that in *Jerry M.* See, e.g., Gerhardstein, *supra* note 14, at 19–20 (listing the guiding principles of a 2008 consent decree involving Ohio's juvenile justice system).

<sup>120</sup> Schlanger & Shay, *supra* note 118, at 152; see also Anna Rapa, Comment, *One Brick Too Many: The Prison Litigation Reform Act As a Barrier to Legitimate Juvenile Lawsuits*, 23 T.M. COOLEY L. REV. 263, 273–74 (2006).

### 3. Modern Institutional Reform Litigation

The PLRA and the theoretical backlash against institutional reform litigation did more to diminish scholarly commentary for a few years than to block the suits themselves.<sup>121</sup> Still, some recent commentators have identified ways in which institutional reform litigation has evolved since its inception.<sup>122</sup>

Most importantly for present purposes, Sabel and Simon argue that the implementation of remedies has moved beyond the traditional “command-and-control” model, in which the judge directs institutional reforms by issuing detailed, regulation-style orders that the bureaucracy must execute.<sup>123</sup> Instead, modern courts tend to adopt an “experimentalist” approach, in which all parties (including advocates for the institution’s clients) collaborate to craft consensus-driven remedies.<sup>124</sup> On this view, public law litigation enforces a “destabilization right”—that is, a right to destabilize the political order that has led an institution to a dysfunctional breaking point.<sup>125</sup> In the juvenile justice context, line staff may beat children because they want control of the institution, and politicians may allow this state of affairs to persist because they are unwilling to offend the staff’s labor union and because the political process fails to account for the interests of youth offenders. The court’s involvement signals that this order cannot continue and calls upon government defendants (personified by politicians and head bureaucrats) to negotiate an acceptable set of reforms with advocates for youth offenders.<sup>126</sup> If the defendants fail to cooperate, then they “will suffer loss of independence and increased uncertainty” when the court enters remedial orders.<sup>127</sup>

Perhaps most ambitiously, Sabel and Simon describe how public law litigation can invoke the venerable political tradition of enlarged interest.<sup>128</sup>

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<sup>121</sup> Sabel & Simon, *supra* note 93, at 1018–19; Schlanger, *supra* note 89, at 556; *see also* Myriam Gilles, *An Autopsy of the Structural Reform Injunction: Oops . . . It’s Still Moving!*, 58 U. MIAMI L. REV. 143, 147 (2003).

<sup>122</sup> *E.g.*, Schlanger, *supra* note 89, at 569, 605 (noting a marked shift away from judgments and towards consent decrees, which caused the suits to fall out of case reporters; arguing that institutional reform lawsuits narrowed their focus to making specific improvements rather than trying to achieve wholesale reform).

<sup>123</sup> Sabel & Simon, *supra* note 93, at 1018–19, 1021–22.

<sup>124</sup> *Id.* at 1053.

<sup>125</sup> *Id.* at 1055 (attributing this term to Roberto Mangabeira Unger).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 1076 (citing AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 37–39 (1996)).

With liberal joinder rules, stakeholders (such as public employee unions, which are not commonly named as parties) can participate in fashioning a remedy.<sup>129</sup> With each stakeholder compelled to give reasons for its position during negotiations, the participants may find their positions altered by the illuminating articulation of other stakeholders' real interests.<sup>130</sup>

Sabel and Simon point out the "important background premise" that institutional reform litigation is appropriate when political processes are unwilling or unable to cure the government's failure to meet minimally acceptable standards.<sup>131</sup> Perhaps a small group with large stakes (for instance, staff in an institution for delinquent youths) effectively gets its way despite the desires of larger but diffuse groups (such as members of the general public who object to the mistreatment of youth offenders).<sup>132</sup> Or it may be that a poor state of affairs can only improve through mutually beneficial coordination (dangerous detention centers are dangerous for staff no less than for youth; a shared interest in safety could be the basis of some improvements) but parties perceive that coordination is impossible.<sup>133</sup> Sabel and Simon believe that court intervention can make reform more likely in both these situations.<sup>134</sup>

Other defenders of institutional reform litigation argue that "litigation causes change," although there are limits to what lawsuits themselves can achieve directly.<sup>135</sup> True reform depends on the existence of "committed state legislators and detention center administrators."<sup>136</sup> In some cases, judicial intervention and accompanying media attention created political momentum for prison reform; yet in others, the adversarial process turns even sympathetic administrators hostile to court intervention.<sup>137</sup>

At a theoretical level, these defenses of institutional reform litigation are open to criticism. First, they argue that suits can be successful, even if

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<sup>129</sup> *Id.* at 1067–68. *But cf.* Patrice Gaines-Carter & Elsa Walsh, 7 *Juveniles Escape From Cedar Knoll*, WASH. POST, July 19, 1986, at B1 (recounting an episode in which a group of forty-six staff members sought to express its concerns to the *Jerry M.* court; one member of the group charged that the decree "gives total control of the institution to the kids").

<sup>130</sup> Sabel & Simon, *supra* note 93, at 1076–77.

<sup>131</sup> *Id.* at 1062, 1064.

<sup>132</sup> *Id.* at 1064–65 (stating that Chayes emphasized this pattern).

<sup>133</sup> *Id.* at 1065.

<sup>134</sup> *Id.* at 1066.

<sup>135</sup> Dale, *supra* note 10, at 732; *see also* Gerhardstein, *supra* note 14, at 15 (asserting that narrow enforcement of minimum standards on conditions of confinement does nothing to promote "the ultimate goal of living safely in a free society upon release without re-offending").

<sup>136</sup> Dale, *supra* note 10, at 733.

<sup>137</sup> Sturm, *supra* note 95, at 684.

they do not directly resolve the problem, so long as they persuade politicians in the executive or legislature to treat seriously the deficiencies and the need for reform. In other words, it is assumed that executives and legislatures are the problem: once courts supply the right political commitment, reform of complex systems will follow. This view does not account for the possibility of agency costs; the government will simply be what politicians want it to be, because agency heads will give the right commands and agency staff will execute them.<sup>138</sup> At best, this understanding of executive power is incomplete; proceeding along this line will most likely lead to a considerable amount of frustration.<sup>139</sup>

Finally, a court's intervention via institutional reform litigation also raises the question of its political responsibility.<sup>140</sup> One is accustomed to hearing of a governor or an agency director called to account for the intolerable conditions existing in an institution. If he fails to improve the situation, the governor is liable to lose control of the agency or pay fines ordered by the court. The governor bears political responsibility, and he cannot defend himself by saying that he has not personally abused any child in the institution. Yet the court rarely grasps that, from the moment it intervenes with orders to the executive branch, it too becomes politically responsible for the system and its future performance.<sup>141</sup> Thus, the court shares in the failure whenever its remedial decree does not bring about the change desired.

#### IV. THEORY AND PRACTICE CAN BE VERY DIFFERENT

In one sense, an institutional reform lawsuit is successful when it results in a court order or consent decree that mandates reforms. But it has long been recognized that institutional implementation of the reforms is both more important and more difficult than prevailing in court.<sup>142</sup>

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<sup>138</sup> See ARENDT, *HUMAN CONDITION*, *supra* note 66, at 188–90, 222–23 (recognizing the fundamental difference between ruling and doing, the two kinds of action in a hierarchy).

<sup>139</sup> See RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS* 10 (3d ed. 1990) (quoting the incumbent Harry Truman, who imagined how then-candidate Dwight Eisenhower would fare as president: “[H]e’ll say, ‘Do this! Do that!’ *And nothing will happen*. Poor Ike—it won’t be a bit like the Army. He’ll find it very frustrating.”).

<sup>140</sup> See, e.g., HANNAH ARENDT, *RESPONSIBILITY AND JUDGMENT* 149–53 (2005) (contrasting individualized moral or legal responsibility with political responsibility, in which a member of a society is vicariously responsible for all acts done in his name).

<sup>141</sup> Cf. Chayes, *supra* note 96, at 1292 (“[B]y issuing the injunction, the court takes public responsibility for any consequences of its decree that may adversely affect strangers to the action.”).

<sup>142</sup> See, e.g., *id.* at 1302 (“The decree does not terminate judicial involvement in the affair: its administration requires the continuing participation of the court.”).

This Part examines the interactions between the *Jerry M.* lawsuit, the broader goals of juvenile corrections reform, and the behavior of the actors who play a role in implementation. One might expect that institutional interests—interests assigned by a person’s position in the bureaucratic landscape rather than by any personal values—would determine how each actor behaves. For example, a chief executive would always oppose court intervention that diminishes his power over an executive branch agency.<sup>143</sup> While institutional interests certainly exist and *inform* behavior, they do not *determine* behavior. Thus, one chief executive might welcome the court’s intervention while a successor might bitterly resist it—and in some cases the same executive might reverse his position to do both.<sup>144</sup> The examination proceeds one group at a time, but the reader should bear in mind that these groups consist of individual members who might act atypically.

It should also be said that the groups profiled here are not the only ones worthy of consideration. Middle management is extremely important to the effectiveness of large organizations.<sup>145</sup> Likewise, the youth offenders themselves play a central role in a juvenile corrections agency.<sup>146</sup> However, neither group figures prominently into this Comment’s point about judicial intervention, and therefore neither is considered here. For the sake of simplicity, this Comment generally avoids the educational component of the District’s reforms, which tended to observe the same arc as the corrections-oriented portions of the decree.<sup>147</sup>

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<sup>143</sup> Sabel & Simon, *supra* note 93, at 1055 (supposing that government officials comply with institutional reform orders rather than risk losing control to enhanced judicial intervention).

<sup>144</sup> One observer characterized the principles of Marion S. Barry Jr., the District’s mayor in 1979–1990 and 1995–1998, as “situationist.” David Remnick, *The Situationist*, NEW YORKER, Sept. 5, 1994, at 84. On the prevalence of these views among politicians, consider an oft-repeated maxim of Everett Dirksen (for whom the U.S. Senate has named one of its three office buildings): “I am a man of fixed and unbending principles, the first of which is to be flexible at all times.” *E.g.*, Alan Ehrenhalt, *Defying Proverbial Wisdom*, GOVERNING, Dec. 2006, at 11.

<sup>145</sup> See DALY ET AL., *supra* note 47, at 21–22 (mentioning the importance of committed middle managers to the District’s implementation of reforms).

<sup>146</sup> See Soler et al., *supra* note 83, at 526–29 (illustrating the District’s “Positive Youth Development” philosophy of rehabilitation).

<sup>147</sup> Compare Julie Wakefield, *Juvenile Delinquencies*, WASH. CITY PAPER (May 16, 1997), <http://www.washingtoncitypaper.com/articles/12695/juvenile-delinquencies> (describing the District’s disastrous attempt to place the Oak Hill school in the hands of a private educational contractor), with DALY ET AL. *supra* note 47, at 11, 15–18 (describing the successful replacement of Oak Hill’s public school with a high-performing charter school in the mid-2000s).



The purpose of this examination is not to assign blame or second-guess old decisions, but to illustrate the kinds of barriers that future reformers may encounter and must overcome.<sup>148</sup> The District's experience shows that a highly detailed consent decree will not foster compliance, except perhaps in an unusual case where the institution's leading deficiency is that it adopted the wrong standards. More generally, this Part argues that consent decrees and the efforts of courts and parties are most effective when they are grounded in a realistic appraisal of the institution's central deficiencies.

Finally, it is worthwhile to restate the main goals of the District's reformers.<sup>149</sup> Since the inception of *Jerry M.*, plaintiffs sought to reduce the number of youths held inappropriately in secure confinement by developing community-based alternatives to incarceration, especially for youths awaiting trial.<sup>150</sup> Additionally, plaintiffs sought to improve the quality of rehabilitative programming inside secure facilities and to ameliorate dangerous conditions related to the physical plant.<sup>151</sup> Even relatively straightforward deficiencies resisted remediation over time.<sup>152</sup> As we will see, the District's implementation of reforms became a matter of great controversy in local politics.<sup>153</sup>

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<sup>148</sup> See Sturm, *supra* note 95, at 647 ("If litigation has not been successful in the past, one must ask whether there is reason to devote substantial resources to it in the future. It is also important to understand why and under what circumstances litigation has prompted improvements in correctional institutions.").

<sup>149</sup> See *supra* text accompanying notes 23–46 (summarizing the provisions of the *Jerry M.* Consent Decree).

<sup>150</sup> A classic example of inappropriate confinement involves the so-called PINS (persons in need of supervision), who are in reality mere status offenders—truant, runaways, and curfew violators. When these offenders are placed in secure facilities, they interact in counterproductive ways with more serious and violent offenders. White et al., *supra* note 50, at 414–15. The interaction is negative, as is the separation from routines of schooling and family life that, in most cases, present far more appropriate means of keeping the youths on a path towards productive adulthood.

<sup>151</sup> *Id.*

<sup>152</sup> As Donna Wulkan, plaintiffs' co-counsel, said: "It seems that these issues have a life of their own. We have been in court on TROs [regarding] temperature control, and we are back in court again, years later, essentially on a motion for contempt on temperature controls." *Id.*

<sup>153</sup> See, e.g., Colbert I. King, Op-Ed, *A Farce Known as Youth Rehabilitation*, WASH. POST, Dec. 15, 2007, at A21 (disbelieving "the rosy scenario painted by DYRS director Vincent Schiraldi and his devotees" in light of separate anecdotes about a "riotous situation" inside a secure facility and a youth who ran away from a community-based group home, then was seen later at a city council hearing); Robert E. Pierre, *Violent Youths in D.C. Being Jailed Longer*, WASH. POST, Dec. 5, 2007, at B1 (recounting a city council hearing at which

## A. SENIOR STAFF AND AGENCY MANAGEMENT

The effectiveness of management can determine an organization's success or failure.<sup>154</sup> This statement retains its truth even where a court intervenes in a government agency's operations.<sup>155</sup> This Section contrasts a protracted period during which management of the District's juvenile corrections agency was in disarray with a later period of greater clarity of purpose. With capable management, the District achieved far more progress towards reforming its juvenile correctional facilities and complying with the *Jerry M.* consent decree. In summary, this Part argues that without capable and cooperative management, litigation is unlikely to cause the desired reforms.

*1. A Series of Ineffective Leaders*

For much of the *Jerry M.* era, an extremely high turnover rate diminished the effectiveness of agency management: in the eighteen years between 1986 and 2004, the District's Youth Services Administration had a series of nineteen top administrators.<sup>156</sup> Naturally, they varied significantly in their approaches to juvenile corrections and their management abilities. Some early administrators received credit (at least from executive branch colleagues) for caring about kids<sup>157</sup> or identifying major management

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"[n]ational and local experts chided critics who have suggested in recent columns by Washington Post columnist Colbert I. King that Schiraldi is 'soft' on criminals").

<sup>154</sup> See, e.g., CHARLES O'REILLY, CASE HR-11, NEW UNITED MOTORS MANUFACTURING, INC. (NUMMI) 4-6 (rev. ed. 2004), available at <http://gsbapps.stanford.edu/cases/documents/HR11.pdf> (describing a famous General Motors manufacturing plant in Fremont, California). Shirking responsibility, substance abuse, and sabotage characterized the Fremont plant's workforce; the plant was GM's least productive and arguably lowest quality. *Id.* at 4. After a joint venture introduced Toyota manufacturing principles, which emphasized trust between management and workers, the plant transformed into one of GM's best—while retaining much of "a work force that GM had written off." *Id.* at 6.

<sup>155</sup> See, e.g., Malcolm M. Feeley & Roger A. Hanson, *The Impact of Judicial Intervention on Prisons and Jails: A Framework for Analysis and a Review of the Literature*, in COURTS, CORRECTIONS, AND THE CONSTITUTION, *supra* note 91, at 12, 21-28 (summarizing various criticisms of the effect of judicial intervention on prison management).

<sup>156</sup> See DALY ET AL., *supra* note 47, at 21 ("YSA directors frequently tried to introduce changes at Oak Hill, but because top leadership changed frequently, facility staff viewed the reforms as nothing more than short-term initiatives that they could wait out.").

<sup>157</sup> E.g., Margaret Engel, *Head of D.C. Youth Services Fired as Probes Continue*, WASH. POST, May 31, 1986, at A7 (quoting a government spokesperson describing Patricia Quann, the first administrator of the *Jerry M.* era, as "someone who cared very much about the job and the children she was trying to help," but saying that Quann faced "a very difficult situation" as a manager).

problems.<sup>158</sup> Later administrators adopted an attitude that the court regarded as “ideologically hostile” to the decree’s goals.<sup>159</sup> Whatever their intentions, none made much improvement.<sup>160</sup> In 2004, the District’s inspector general concluded that the agency’s “leadership void has a very negative impact on discipline, dedication, morale, and loyalty. Too many employees are not performing their day-to-day tasks satisfactorily, which, in turn, results in operational breakdowns across the board in security, oversight, monitoring of youths, . . . [and] other areas.”<sup>161</sup>

In the lifetime of an institutional reform lawsuit, the most important senior managers may be those who negotiate the consent decree.<sup>162</sup> This first generation of managers establishes the terms that endure until the government performs<sup>163</sup>—often long after that generation has departed.<sup>164</sup>

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<sup>158</sup> E.g., Victoria Churchville & Barton Gellman, *D.C. Youth Services Chief Reportedly Told to Resign*, WASH. POST, June 6, 1989, at D1 (stating that Jesse E. Williams authored a critical assessment of the agency in 1983, years before he came to the agency, and noting sources’ views that, as administrator, Williams “pressed with little success for the budget increases he thinks necessary to meet court-ordered standards”). Of course, identifying problems and solving them are distinct activities.

<sup>159</sup> Lewis, *supra* note 54, at D5 (reporting that Judge Ricardo M. Urbina once welcomed new agency management by commenting that the city seemed “no longer ideologically hostile” to the consent decree).

<sup>160</sup> See, e.g., Joseph Tulman et al., Symposium, *Reactions and Solutions*, 3 D.C. L. REV. 425, 430–36 (1995) (reprinting remarks by acting YSA administrator Joyce Burrell, who described her job as a “balancing act of deciding whether to rush [youth offenders] out [of secure confinement] . . . or pay the fines” assessed for overcrowding).

<sup>161</sup> ANDERSEN, *supra* note 58, at 22.

<sup>162</sup> The Supreme Court recently frowned on federally entered consent decrees that “bind state and local officials to the policy preferences of their predecessors and may thereby ‘improperly deprive future officials of their designated legislative and executive powers.’” *Horne v. Flores*, 557 U.S. 433, 449 (2009) (quoting *Frew v. Hawkins*, 540 U.S. 431, 441 (2004)). The District attempted to seize on *Horne*’s reasoning as grounds for terminating all structural reform decrees against it in federal court; the district courts supervising those consent decrees have uniformly found the argument unimpressive. See *Salazar v. District of Columbia*, 729 F. Supp. 2d 257, 262 (D.D.C. 2010); *Evans v. Fenty*, 701 F. Supp. 2d 126, 147–49 (D.D.C. 2010); *LaShawn A. ex rel. Moore v. Fenty*, 701 F. Supp. 2d 84, 115 (D.D.C. 2010); see also DeBonis, *supra* note 72 (spotlighting the sharp dispute between attorney general Peter Nickles and the plaintiffs’ attorneys and judges involved, and showing that the lawsuits have support among the District’s legislators). But the D.C. Circuit has reversed one refusal to terminate, concluding that “[t]he district court’s Rule 60(b)(5) inquiry fell short of what is required by *Horne v. Flores*.” *Petties ex rel. Martin v. District of Columbia*, 662 F.3d 564, 571 (D.C. Cir. 2011).

<sup>163</sup> See Sandler & Schoenbrod, *supra* note 11, at 117.

<sup>164</sup> See Bradley S. Chilton & Susette M. Talarico, *Politics and Constitutional Interpretation in Prison Reform Litigation: The Case of Guthrie v. Evans*, in COURTS, CORRECTIONS, AND THE CONSTITUTION, *supra* note 91, at 115, 124–25 (describing the “generational effect” existing where one generation of institutional reform litigants designs a

In the District, the senior managers who agreed to the consent decree's provisions appear not to have considered agency costs or any other difficulties of implementation.<sup>165</sup> Such blindness to the near future suggests that the District's managers<sup>166</sup> wrongly believed that, by accepting the consent decree, they could make the litigation go away.<sup>167</sup> Alternatively, the first-generation managers may rationally have recognized their ability to personally depart for other jobs, leaving future generations to bear the costs of implementing a poorly designed agreement.<sup>168</sup>

Even if the first-generation managers intend to live with the lawsuit, there remains the question of whether they will subvert their own narrow interests to the broader goals of the institutional reform lawsuit.<sup>169</sup> The annals of adult prison litigation include cautionary tales in which skillful administrators exploit lawsuits not to reform but to entrench their philosophies of corrections.<sup>170</sup> This type of response shows that, in

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remedy but their successors implement it, sometimes without remembering the purpose of the decree's provisions); *see also* Cripe, *supra* note 110, at 275 (referring to prison litigation and lamenting that "[t]he sad fact is that the directors or commissioners who approved the settlement often depart soon after, in the perpetual musical chairs operation which besets most correction systems in this country").

<sup>165</sup> Responsibility for negotiating the decree appears to have belonged not to the head of the Youth Services Administration, but to the parent agency's head, the Commissioner of Social Services. Compare Margaret Engel & Benjamin Weiser, *Settlement Seen Near on Juvenile Facilities*, WASH. POST, July 2, 1986, at B1 (reporting a statement of Commissioner Audrey Rowe on proposed settlement terms designed to protect youths from staff abuse: "Management doesn't condone that, so that isn't a problem in [negotiating] the settlement"), with Jerry M. Consent Decree, *supra* note 2, at 11 ("The defendants and their successors in office and agents, employees or others who are providing services to or on behalf of YSA, related to juveniles placed in YSA custody, shall comply with the terms of this Decree.").

<sup>166</sup> On the motivations of the mayor who agreed to the settlement, *see infra* text accompanying notes 347–52.

<sup>167</sup> See Margaret Engel, *Report Cites D.C. Youth Agency 'Chaos,'* WASH. POST, Dec. 18, 1986, at B1 (reporting the court monitor's assessment that, six months after the consent decree was signed, the system "remains in chaos," but noting that the city "expended substantial effort and made improvements in some areas" (internal quotation marks omitted)).

<sup>168</sup> Compare Engel & Weiser, *supra* note 165, with *USDA Biographies: Audrey Rowe*, U.S. DEPT OF AGRIC., [http://www.usda.gov/wps/portal/usda/usdahome?contentidonly=true&contentid=bios\\_rowe.xml](http://www.usda.gov/wps/portal/usda/usdahome?contentidonly=true&contentid=bios_rowe.xml) (retrieved Feb. 4, 2011) (touting "a career of non-stop successes") (since the initial drafting of this article, the quoted material has been removed from the webpage; a PDF of the earlier version is on file with the author).

<sup>169</sup> See Sandler & Schoenbrod, *supra* note 11, at 117 (stating that "agency officials . . . often seek to use the lawsuit as a way to implement their own favorite ideas and to free themselves from policy constraints and budget restrictions imposed by other officials").

<sup>170</sup> See Schlanger, *supra* note 89, at 562–63 (quoting one prison administrator who explained: "we used 'court orders' and 'consent decrees' for leverage. We rant and raved

practice, one cannot count on institutional reform lawsuits to destabilize an established order that reflects political blockage, as some theorists have supposed.<sup>171</sup>

There is no doubting that the parade of ineffective managers and overall failure to achieve compliance frustrated the *Jerry M.* court<sup>172</sup> and plaintiffs<sup>173</sup> alike. This frustration led to harsh sanctions, such as contempt findings and the imposition of fines for ongoing noncompliance.<sup>174</sup> The initial fines prompted the District to fire an administrator—but instead of seeking a manager to achieve compliance, the mayor's top advisors began expressing second thoughts about the consent decree.<sup>175</sup> Instead of persuading the defiant defendant, the court's attempt at coercion contributed to the adversarial hostility that marked *Jerry M.*'s implementation phase.<sup>176</sup>

## 2. Organizational Changes

Some evidence suggests that the organizational structure of the District's agencies—primarily, the fact that the juvenile corrections agency was, for a long time, a bureau buried within a much larger department—contributed to the slow pace of change.<sup>177</sup> However, the experience of other states suggests that no one organizational structure is inherently more

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for decades about getting federal judges 'out of our business'; but we secretly smiled as we requested greater and greater budgets to build facilities, hire staff, and upgrade equipment").

<sup>171</sup> See, e.g., Sabel & Simon, *supra* note 93, at 1055–56, 1065–67. Recognizing that institutional reform lawsuits often make available resources that the agency might not otherwise obtain, Sabel and Simon suppose that these resources induce agencies to participate in the crafting of a remedy. *Id.* at 1065–66.

<sup>172</sup> See, e.g., *Jerry M. v. District of Columbia*, C.A. No. 1519-85 (D.C. Super. Ct. Apr. 15, 2004) (Order VIII) at 21 (finding "a continuing pattern evident in previous enforcement hearings, a lack of coherent planning at the highest levels, faulty implementation, and a tendency to thrust hastily devised compliance policies upon mid-level and line staff").

<sup>173</sup> Churchville & Gellman, *supra* note 158, at D1 (quoting a plaintiffs' attorney's assessment that "the defendants have a history and a pattern of changing the guard periodically and that becomes an excuse to stall and delay").

<sup>174</sup> *District of Columbia v. Jerry M.*, 571 A.2d 178, 190–92 (D.C. 1990) (upholding the trial judge's finding of contempt); Churchville & Gellman, *supra* note 158, at D1 (reporting the imposition of fines of \$100 per day per youth held in secure confinement in excess of court-ordered population limits).

<sup>175</sup> See Churchville & Gellman, *supra* note 158, at D1 (suggesting that the imposition of fines was a proximate cause of an administrator's firing, and attributing reservations to the city administrator and corporation counsel).

<sup>176</sup> Cf. Sturm, *supra* note 95, at 684 (noting that the executive's initial receptiveness to an institutional reform lawsuit can give way to hostility).

<sup>177</sup> See DALY ET AL., *supra* note 47, at 3.

conducive to reform.<sup>178</sup> Nonetheless, a major organizational shakeup can invigorate a lethargic public agency.<sup>179</sup>

At the outset of *Jerry M.*, the District's youth corrections agency was known as the Youth Services Administration (YSA).<sup>180</sup> The administrator of YSA reported to the commissioner of social services, who reported to a director of the Department of Human Services (DHS), who reported to the mayor.<sup>181</sup> Thus, the YSA administrator had to fight for resources and management autonomy against a host of higher-ups, who might second-guess the administrator or have other priorities for the department.<sup>182</sup>

Meanwhile, DHS suffered from its own chronic bouts of mismanagement.<sup>183</sup> The District's inability to improve conditions in secure facilities stemmed in part from "insufficient oversight by senior management at DHS who may be too far removed from YSA's day-to-day operations and the youths being served."<sup>184</sup> Accordingly, the District's inspector general recommended that the mayor consider removing YSA from DHS and making it a separate department with a director directly accountable to the mayor.<sup>185</sup>

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<sup>178</sup> Compare MILLER, *supra* note 6, at 32 (stating that Massachusetts created its Department of Youth Services after a series of youth abuse scandals rocked its Youth Service Board; Jerome Miller, the department's first head, embarked on the nation's first juvenile justice deinstitutionalization effort), with MENDEL, MISSOURI MODEL, *supra* note 9, at 14 (noting that Missouri's Division of Youth Services, the model youth corrections agency, is part of the state's larger Department of Social Services). See also John Kelly, *Stand-Alone Juvenile Justice Agencies Dwindling in Number*, YOUTH TODAY (Jan. 22, 2011), [http://www.youthtoday.org/view\\_article.cfm?article\\_id=4584](http://www.youthtoday.org/view_article.cfm?article_id=4584) (stating that sixteen states currently have separate juvenile justice agencies and noting a recent trend towards merging them with child welfare agencies or social services departments).

<sup>179</sup> Cf. THE FEDERALIST NO. 70, at 451 (Alexander Hamilton) (B.F. Wright ed., 1961) ("Energy in the Executive is a leading character in the definition of good government . . . . [A]nd a government ill executed, whatever it may be in theory, must be, in practice, a bad government.").

<sup>180</sup> Reorganization Plan No. 2 of 1979, D.C. CODE div. I, tit. 1, ch. 15, subch. III, pt. A, § IV(C)(4) (LexisNexis 2001).

<sup>181</sup> See, e.g., *id.* (showing YSA's place in the bureaucracy); *Jerry M.* Consent Decree, *supra* note 2, at 40–41 (stating that each of these officials is a *Jerry M.* defendant, in his official capacity).

<sup>182</sup> See Churchville & Gellman, *supra* note 158, at D1 (stating that the director of human services sided with the commissioner of social services, who refused to support the YSA administrator's budget requests).

<sup>183</sup> See, e.g., Michael Powell, *Wasting Time, Space and Money: Business as Usual at Human Services*, WASH. POST, July 20, 1997, at A22.

<sup>184</sup> ANDERSEN, *supra* note 58, at 22.

<sup>185</sup> *Id.* at 24.

Though DHS disagreed with the recommendation, the city council responded to mounting pressure from the courts and the public by adopting it legislatively.<sup>186</sup> The council hoped the altered management structure would enable the cabinet-level agency to comply with the terms of the *Jerry M. decree*.<sup>187</sup> But the restyled organization remained unlikely to change much, so long as it lacked effective management.<sup>188</sup>

### 3. *Proactive Management, Compliance, and Far-Reaching Reform*

The new agency, renamed the Department of Youth Rehabilitation Services (DYRS), found a highly capable leader in Vincent N. Schiraldi, a longtime reform advocate who had studied the District and brought with him a reform-oriented senior management team.<sup>189</sup> Schiraldi took the job hoping “to improve decency and outcomes for a population of young people who are nearly 100% youth of color.”<sup>190</sup> Instead, because the department’s operations were so profoundly broken, he quickly found his energy consumed with basic operational questions such as determining who would fix broken boilers that robbed secure facilities of heat and how to purchase adequate supplies of underwear.<sup>191</sup>

Of course, Schiraldi had more ambitious plans, such as reducing the overuse of secure confinement and implementing evidence-based rehabilitation programs.<sup>192</sup> By developing community-based alternatives to secure confinement, DYRS reduced the average number of youths in locked

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<sup>186</sup> Department of Youth Rehabilitation Services Establishment Act of 2004, 52 D.C. Reg. 2025, D.C. Law 15-335 (Apr. 12, 2005) (codified at D.C. CODE §§ 2-1515.01–2-1515.10 (LexisNexis 2001)); ANDERSEN, *supra* note 58, at 24 (reprinting the DHS response to the recommendation) (“The current leadership at DHS is capable of providing management oversight necessary for YSA.”).

<sup>187</sup> See D.C. COUNCIL COMM. ON HUMAN SERVS., REPORT ON BILL 15-1000, at 2, 9 (2004).

<sup>188</sup> See ANDERSEN, *supra* note 58, at 24 (“[G]iven a reasonable period of time, a highly experienced manager with a background in juvenile justice who is accountable directly to the Executive Office of the Mayor, can bring stability and focus to YSA operations, and put the agency on the path to meeting all requirements of the Jerry M. Decree.”).

<sup>189</sup> DALY ET AL., *supra* note 47, at 5, 21 (mentioning that Schiraldi hired the new agency’s deputy director, chief of staff, chief of committed services, and Oak Hill superintendent). Schiraldi was not the District’s first choice for the position; for a discussion of his appointment, see *infra* text accompanying note 359.

<sup>190</sup> Schiraldi, Remarks, *supra* note 65, at 2.

<sup>191</sup> *Id.*

<sup>192</sup> See Soler et al., *supra* note 83, at 525–26. Coauthor Marc Schindler was a key member of Schiraldi’s management team and succeeded him as director of the agency. See *infra* Part IV.G. For a description of DYRS’s reform agenda, including its rehabilitative model and measurements of the agency’s success, see Soler et al., *supra* note 83, at 525–29.

custody by nearly 40%, from 255 in 2005 to 154 in 2009.<sup>193</sup> It is more difficult to quantify how DYRS changed its culture to become more rehabilitative, but the contrast from the culture of a traditional youth prison is stark.<sup>194</sup> For example, DYRS abandoned the use of solitary confinement, which is central to the maintenance of order inside many youth correctional facilities.<sup>195</sup>

Most concretely, the District constructed New Beginnings, a radically different, sixty-bed secure facility that replaced the long-troubled Oak Hill Youth Center.<sup>196</sup> Describing the facilities at New Beginnings, Schiraldi said:

It has beautiful windows and light, wood rafters, wooden doors, windows in the kids' rooms that they can open themselves. It has almost three times as much programming space as is required by national standards (including a 125 seat auditorium where the kids regularly perform music and plays and have awards ceremonies), a terrific gymnasium, a school with smart boards in every room, and a great shop class. These words don't come out of my mouth easily, but this is the nicest, most decent physical plant of any correctional facility I've ever been in.<sup>197</sup>

In response to pressure from the court and the council, the District had budgeted over \$34 million for the new facility shortly after Schiraldi's arrival.<sup>198</sup> Yet without the right leadership, even this massive appropriation

<sup>193</sup> See *id.* at 527.

<sup>194</sup> See Wildeboer, *supra* note 71 (describing facilities and programming at New Beginnings, and contrasting them to those of its predecessor, Oak Hill, and Illinois detention centers).

<sup>195</sup> Robert Wildeboer, *Inside and Out: The Impact of Solitary Confinement in a Youth Prison* (WBEZ 91.5 FM broadcast May 12, 2010), available at <http://www.wbez.org/episode-segments/inside-and-out-impact-solitary-confinement-youth-prison#> (audio recording), <http://insideandout.chicagopublicradio.org/content/impact-solitary-confinement-youth-prison> (written transcript) (quoting Schindler saying, “[y]ou can try and beat ‘em down, which is what a lot of correctional approaches do, and try to punish them into good behavior, but all the experience and the research shows . . . it just doesn’t work”); see also MILLER, *supra* note 6, at 65, 99–100 (describing the “Tombs” in Massachusetts’s harshest extended isolation facility, to which youths from other facilities could be transferred as a punishment for bad behavior).

<sup>196</sup> See Robert E. Pierre, *Oak Hill Center Emptied and Its Baggage Left Behind*, WASH. POST, May 29, 2009, at B1 (quoting Schiraldi: “This is the anti-prison”).

<sup>197</sup> Schiraldi, Remarks, *supra* note 65, at 4; see also Hamil R. Harris, Blog, ‘New Beginnings’ for Youthful Offenders, WASH. POST (May 29, 2009, 4:40 PM), [http://voices.washingtonpost.com/dc/2009/05/new\\_beginnings\\_for\\_youthful\\_of.html](http://voices.washingtonpost.com/dc/2009/05/new_beginnings_for_youthful_of.html) (posting a video of the facility).

<sup>198</sup> See COUNCIL OF THE DIST. OF COLUMBIA, COMM. ON HUMAN SERVS., REPORT ON THE FY 2006 BUDGET REQUEST 15–16 & n.6 (May 9, 2005) (noting that replacement of Oak Hill had been urged by the *Jerry M.* plaintiffs, the 2001 report of the Mayor’s Blue Ribbon Commission on Youth Safety and Juvenile Justice Reform, and Title XI of the Omnibus



likely would not have resulted in reform. When Schiraldi arrived at DYRS, the agency planned to replace Oak Hill with a prison four times larger than New Beginnings,<sup>199</sup> which “by virtue of its sheer size would have encouraged an over-reliance on the use of secure incarceration . . . and effectively prevented the city from making substantial investments towards developing effective community-based programs, supports and services.”<sup>200</sup> The small size of New Beginnings reflects a deliberate choice, informed by research about the population of the District’s youth offenders,<sup>201</sup> to resist overconfinement by constraining the availability of confinement space.<sup>202</sup>

While it may be simple to suppose that building bigger facilities will alleviate overcrowding and its attendant problems, facility expansion presents a significant danger of replicating preexisting problems on a larger scale.<sup>203</sup> A federal court once ordered the District to construct an additional 300-bed facility to alleviate overcrowding at the Lorton Youth Center, where the District confined those offenders aged eighteen to twenty-two who were deemed promising candidates for rehabilitation.<sup>204</sup> This order

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Juvenile Justice Act of 2004, 52 D.C. Reg. 1188, D.C. Law 15-261 (effective Mar. 17, 2005) (codified at D.C. CODE § 24-941 (LexisNexis 2001))).

<sup>199</sup> See generally DEP’T OF HUMAN SERVS. (D.C.), YOUTH SERVS. ADMIN., LITTLE RIVER YOUTH CORRECTIONAL FACILITY (Oct. 31, 2003) (on file with the author) (stating program requirements and proposing a site plan for a 240-bed secure facility, to be called “Little River”).

<sup>200</sup> Testimony of Vincent N. Schiraldi Before the D.C. Council Committee on Human Services, Feb. 16, 2006, at 2 [hereinafter Schiraldi Testimony].

<sup>201</sup> DEP’T OF YOUTH REHAB. SERVS. (D.C.), OAK HILL REPLACEMENT CAPACITY NEEDS ANALYSIS (Feb. 20, 2006) (on file with the author) (citing an analysis conducted by the Annie E. Casey Foundation concluding that a sixty-bed facility would be appropriate to house the District’s most serious youth offenders, who would stay longer in secure custody to protect public safety and provide adequate time for therapeutic rehabilitation); cf. *Jerry M. v. District of Columbia*, C.A. No. 1519-85 (D.C. Super. Ct. Oct. 9, 1987) (Memorandum Order A) at 19 (ordering the District to reduce the number of committed youths held in secure confinement to sixty, in accordance with the *Jerry M.* panel’s recommendation).

<sup>202</sup> Schiraldi Testimony, *supra* note 200, at 8 (mentioning plans to design a sixty-bed facility to replace Oak Hill); see also Bart Lubow & Joseph B. Tulman, Introduction, *The Unnecessary Detention of Children in the District of Columbia*, 3 D.C. L. REV. ix, xii (1995) (“[I]f a community builds detention beds, the decision makers will fill those beds with children. If a community refuses to maintain detention beds, community resources and programs will work with children and produce better results.”).

<sup>203</sup> See Schiraldi Testimony, *supra* note 200, at 2 (cautioning against an “edifice complex” which supposes that all the problems of juvenile justice can be solved with newer, larger facilities).

<sup>204</sup> See *U.S. v. Alsbrook*, 336 F. Supp. 973, 981–82 (D.D.C. 1971) (Gesell, J.) (supplemental memorandum) (predating self-government in the District) (describing elements of a plan developed by the Federal Bureau of Prisons and the mayor–commissioner to create facilities for youth offenders, separated from the District’s adult prison in Lorton,

sought to bring the facilities up to the standards imposed by “[t]he Constitution, the [federal] Youth Corrections Act, and the conscience of a civilized society.”<sup>205</sup> But construction of a new Lorton Youth Center II did not spur improvements in other fundamental aspects of rehabilitative services.<sup>206</sup>

Though Schiraldi’s leadership proved extraordinary in many ways, it would be a mistake to conclude that reform depended on Schiraldi’s personal involvement. Schiraldi’s efforts to change the culture of the secure facilities relied on extensive staff training and technical assistance from the Missouri Youth Services Institute, a consulting firm founded by Mark Steward to help other jurisdictions adopt the “Missouri model” of youth corrections.<sup>207</sup> During Schiraldi’s tenure, the District also began participating in the Juvenile Detention Alternatives Initiative, an extensive national effort of the Annie E. Casey Foundation that engages local judges, prosecutors, defenders, juvenile corrections and probation agencies, and other stakeholders to reduce the inappropriate incarceration of youths awaiting trial.<sup>208</sup> Though YSA sought the help of consultants before Schiraldi’s arrival, the rudderless agency wasted the consultants’ advice.<sup>209</sup>

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Virginia); *see also* HISTORICAL SOC’Y OF THE D.C. CIRCUIT, ORAL HISTORY PROJECT: HON. GERHARD A. GESELL app.3 (1998), *available at* [http://www.dcchs.org/GerhardAGesell/gerhardagesell\\_complete.pdf](http://www.dcchs.org/GerhardAGesell/gerhardagesell_complete.pdf) (recounting Judge Gesell’s memory of ordering reluctant city leaders to build a new facility).

<sup>205</sup> *Alsbrook*, 336 F. Supp. at 983.

<sup>206</sup> *See* Ogletree, *supra* note 111, at 704–06 (citing *United States v. Tillman*, 374 F. Supp. 215 (D.D.C. 1974) and *United States v. Norcome*, 375 F. Supp. 270 (D.D.C. 1974)) (stating that federal judges ordered later enhancements in the quality of diagnostic procedures employed for entering youths).

<sup>207</sup> Soler et al., *supra* note 83, at 525–27 (describing the District’s changes); Christine Vestal, *States Adopt Missouri Youth Justice Model*, STATELINE (Mar. 7, 2008), *available at* <http://www.stateline.org/live/printable/story?contentId=288904> (profiling MYSI).

<sup>208</sup> RICHARD A. MENDEL, ANNIE E. CASEY FOUND., TWO DECADES OF JDAI: FROM DEMONSTRATION PROJECT TO NATIONAL STANDARD 2, 8 (2009) [hereinafter *TWO DECADES OF JDAI*], *available at* [www.aecf.org/~media/Pubs/Initiatives/Juvenile%20Detention%20Alternatives%20Initiative/TwoDecadesofJDAIFromDemonstrationProjecttoNat/JDAI\\_National\\_final\\_10\\_07\\_09.pdf](http://www.aecf.org/~media/Pubs/Initiatives/Juvenile%20Detention%20Alternatives%20Initiative/TwoDecadesofJDAIFromDemonstrationProjecttoNat/JDAI_National_final_10_07_09.pdf). For a comprehensive list of technical assistance and capacity-building services that philanthropies provided to DYRS, see LIZ RYAN & MARC SCHINDLER, NOTORIOUS TO NOTABLE: THE CRUCIAL ROLE OF THE PHILANTHROPIC COMMUNITY IN TRANSFORMING THE JUVENILE JUSTICE SYSTEM IN WASHINGTON, D.C. 25–29 (2011), *available at* [http://www.publicwelfare.org/Newsroom/Overview/11-12-01/Reforming\\_Juvenile\\_Justice\\_in\\_DC.aspx](http://www.publicwelfare.org/Newsroom/Overview/11-12-01/Reforming_Juvenile_Justice_in_DC.aspx).

<sup>209</sup> *See, e.g.,* ANDERSEN, *supra* note 58, at 27–30 (listing the specific findings of a section entitled, “YSA’s use of consultants has been largely ineffective and characterized by unauthorized overspending, incomplete deliverables, unfulfilled objectives, and poor agency oversight”).

Finally, despite Schiraldi's success in transforming the agency, some observers have suggested the agency would benefit over the long term from a director with a management style that made line staff feel more valued.<sup>210</sup>

In other words, reform becomes a realistic prospect when administrators possess the desire and ability to implement a research-based and cost-effective approach to youth corrections.<sup>211</sup> Most importantly for present purposes, a juvenile corrections agency with capable and committed administrators can accomplish and sustain progress far more effectively than a lawsuit can.<sup>212</sup>

#### B. LINE STAFF

A youth rehabilitation agency's most important employees are its front-line staff, who have great potential to influence youths—positively or negatively—through their constant interactions.<sup>213</sup> In the District, some staff adopted Schiraldi's philosophy of reform and served as a valuable source of suggestions for improvement.<sup>214</sup> However, the illustrations below show that uncooperative staff members can undermine the implementation of reforms in ways that mock both the control of agency management and the efficacy of judicial intervention. Understanding and overcoming staff

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<sup>210</sup> See DALY ET AL., *supra* note 47, at 27; Nikita Stewart, *Juvenile Justice Chief in D.C. is Leaving Post*, WASH. POST, Dec. 1, 2009, at B4 (quoting D.C. Councilmember Tommy Wells). Schiraldi's blunt manner of speaking could upset the agency's staff. *E.g.*, Sue Anne Pressley, *The Evolution of Oak Hill*, WASH. POST, April 9, 2006, at A1 (repeating Schiraldi's widely circulated remark that "I would not want to kennel my dog at Oak Hill," which staff understood as an insult).

<sup>211</sup> See MENDEL, MISSOURI MODEL, *supra* note 9, at 5. "A new wave of reform is gathering force, dual-powered by a growing recognition that the conventional practices aren't getting the job done, and by the accumulating evidence that far better results are available through a fundamentally different approach." *Id.*

<sup>212</sup> Dale, *supra* note 10, at 733.

<sup>213</sup> See MENDEL, MISSOURI MODEL, *supra* note 9, at 28 (stating that Missouri's model of secure facilities depends on "intensive supervision by highly motivated, highly trained staff constantly interacting with youth to create an environment of trust and respect"); see also Anthony Bottoms & Justice Tankebe, *Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice*, 102 J. CRIM. L. & CRIMINOLOGY 119, 161 (2012) ("[W]ithin criminal justice systems most front-line staff are themselves significant power-holders. Hence, the full study of power-holder legitimacy in the field of criminal justice necessarily requires attention to be paid, not only to senior but also to junior power-holders and to the interaction between them.").

<sup>214</sup> DALY ET AL., *supra* note 47, at 18 (stating that school staff at the District's New Beginnings facility helped implement the agency's new rehabilitative model through their constructive interactions with youths and by showing unit staff, who were generally more skeptical, that the model could succeed). For a report on DYRS staff attitudes to specific reforms, as expressed in focus groups and interviews, see *id.* at 5–8, 17–26.

resistance is critical to the success of a reform effort, whether it began on the initiative of agency management or the court.<sup>215</sup> Most particularly, this Section shows why litigants and the court should not presume that detailed court orders will receive automatic obedience, even if government leaders use their utmost diligence.

In making changes at DYRS, Schiraldi and his management team “ran into staff resistance at almost every step.”<sup>216</sup> The predominantly “correctional-minded” staff resisted a new rehabilitative model designed to build on the strengths of youths and their families.<sup>217</sup> Still, many of the staff who opposed Schiraldi’s reforms resolved not to change and not to leave, but to outlast his tenure—a reasonable option considering the churn of leaders during the time of the *Jerry M.* consent decree.<sup>218</sup>

Before Schiraldi arrived and even before *Jerry M.* began, staff resisted court-imposed reforms affecting the institutional culture. For example, when a pre-*Jerry M.* court issued a disciplinary code to standardize punishment for confined youths who displayed disobedience, staff routinely disregarded the code and continued to punish youths as they pleased.<sup>219</sup> Even when staff complied with the rules, they could do so in ways that undermined the rules’ purpose of standardizing discipline.<sup>220</sup> Because the court cannot be present to enforce its order, telling line staff what to do lies

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<sup>215</sup> *Id.* at 27 (“The literature on best practices in implementing juvenile and criminal justice programs shows that gaining acceptance from staff is extremely important, particularly for reforms that involve a transformation of agency philosophy and institutional culture.”).

<sup>216</sup> Schiraldi, Remarks, *supra* note 65, at 3.

<sup>217</sup> Soler et al., *supra* note 83, at 526, 529.

<sup>218</sup> See Schiraldi, Remarks, *supra* note 65, at 1.

<sup>219</sup> Weiser, *supra* note 79, at A1. For example, a 300-pound recreation counselor, who found a youth with a bottle of liquor at football practice, promptly “slammed his forearm into the boy’s chest and sent him sprawling.” *Id.* at A1, A18. He explained that the court’s new rules were not his priority: “I deal with the problem first, rules second.” *Id.* at A1. And he lamented the effect of court-imposed standards on the facility: “If we’d go back to some of the things that we used to do in the old days we would be a better institution.” *Id.* at A18.

<sup>220</sup> *Id.* In one case, a counselor accused six boys of plotting to escape and hiding a pair of scissors. The counselor, who had pronounced the boys “dead meat,” reacted angrily when a panel of other staff ordered only seven days in isolation for each offense. Told that seven days was the code’s maximum punishment, the counselor urged ignoring the code “because any appeal would come too late—the boys would have already served their sentences.” *Id.* An on-site public defender exclaimed “You can’t do that!” so the counselor proposed that the boys could remain “*Right here*” under his direct supervision for longer. *Id.* During her turn to speak, the defender added, “I’ve heard that a few of the boys were visited [before the hearing] by various counselors, who were choking them, slapping them around, threatening them . . .” *Id.* (alterations in original). The counselor began shouting at the defender, and the panel adjourned after ordering the boys to isolation. *Id.*

outside the court's zone of competency—unless the court puts itself in the position of management by imposing the extreme remedy of receivership.<sup>221</sup>

On one view, the effort to change a juvenile correctional facility is a battle for control. For a very long time, an alarming number of staff brought alcohol and drugs inside secure facilities and sold or gave them to youths.<sup>222</sup> Obviously this smuggling undermined whatever treatment efforts were even attempted inside the facility, where “nearly 100% of . . . youths suffer[ed] from substance abuse problems.”<sup>223</sup> Staff may have enhanced their control of a unit by distributing drugs to favored youths or keeping them from disfavored youths.<sup>224</sup> Alternatively, staff may have sold drugs to youths simply to make money for themselves.<sup>225</sup> Either way, it is clear that some staff would readily sacrifice rehabilitative progress if it could help them; in such circumstances management does not appear to have control.

Staff resistance can take other forms that do not harm youths directly. Many staff, with apparent assistance from lower management, manipulated

<sup>221</sup> See *Jerry M. v. District of Columbia*, 738 A.2d 1206, 1213 (D.C. 1999) (“The appointment of a receiver to act in the place of ‘elected and appointed officials is an extraordinary step warranted only by the most compelling circumstances.’ Essentially it is the remedy of last resort, and therefore, should be undertaken only when absolutely necessary.” (quoting *Morgan v. McDonough*, 540 F.2d 527, 535 (1st Cir. 1976))).

<sup>222</sup> Some staff dealt drugs to confined youths in 1980, in 2004, and in between. See, e.g., *In re An Inquiry Into Allegations of Misconduct Against Juveniles Detained at and Committed at Cedar Knoll Inst.*, 430 A.2d 1087, 1089 (D.C. 1981) (noting that Family Court Judge Gladys Kessler found evidence of a drug trade between staff dealers and youth customers); ANDERSEN, *supra* note 58, at 30 (“[Oak Hill] employees and substance abuse treatment counselors stated that Youth Correctional Officers (YCOs) are a primary source of the illegal substances used by youths.”); Benjamin Weiser, *Delinquents, Staff Linked in Deals*, WASH. POST, Sept. 29, 1985, at A1 [hereinafter *Delinquents*] (describing “an institution that has almost given up trying to combat the drug problem, . . . where a few counselors allegedly use and deal in drugs themselves”).

<sup>223</sup> ANDERSEN, *supra* note 58, at 30–31 (stating that many youths who were drug-free upon entering Oak Hill later tested positive for marijuana and PCP after a period of confinement). But cf. Jeffrey A. Butts, Blog, *How Prevalent Are Substance Abuse and Mental Health Issues in Juvenile Justice? The Answer May Surprise You* (Feb. 16, 2011), <http://blog.reclaimingfutures.org/?q=node/1461> (citing Gail Wasserman et al., *Psychiatric Disorder, Comorbidity, and Suicidal Behavior in Juvenile Justice Youth*, 37 CRIM. JUST. & BEHAV. 1361 (2011)) (interpreting a study of a large sample of youths involved at various levels with the juvenile justice system as showing that repeat offenders and youths in secure confinement are much more likely to have substance abuse or mental health issues than first-time or lower-level juvenile offenders).

<sup>224</sup> In 1985, one youth at Oak Hill explained that a staff member supplied him with drugs, which the youth sold inside the institution. Weiser, *Delinquents*, *supra* note 222, at A14. The youth’s money “won him a special standing with his own counselor” because the youth was able to “lend[] his counselor money as a way of gaining immunity.” *Id.*

<sup>225</sup> *Id.* (quoting one head counselor: “There’s a lot of profiteers [among the staff]”).

work schedules and timecards to supplement their regular pay with large helpings of overtime.<sup>226</sup> Overtime abuse can become pervasive when there is widespread absenteeism or when lower management is allowed to grant overtime to favored staff. Overspending on overtime puts chronic pressure on the department's budget, consuming funds intended for other uses, including the development of alternatives to placing delinquent youths in secure detention.<sup>227</sup> While overtime abuse might not harm youths as directly as other staff actions can, it is an important and readily quantifiable sign that middle management is neither susceptible to control of senior management nor disposed to act properly outside of close supervision.<sup>228</sup>

A much more visible and damaging form of staff sabotage consisted of recurring staff-aided escapes.<sup>229</sup> By passively declining to intervene to stop an escape in progress<sup>230</sup> or sometimes assisting more actively, staff can express displeasure by disrupting the institutional order.<sup>231</sup> Explaining why one escape occurred, an unnamed source told a reporter: "Many of the old staff are angry that overtime has been cut back significantly, and there is a feeling that they may be letting the kids go and looking the other way in an attempt to make the place look like it's falling apart."<sup>232</sup>

Escapes are damaging because, unlike nearly every other type of occurrence at a secure facility, they receive extensive media attention. This attention reflects poorly not on the staff, but on reformers (whether agency

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<sup>226</sup> See, e.g., ANDERSEN, *supra* note 58, at 101–03 (investigating the agency in the year before Schiraldi's arrival). Line staff routinely disregarded a timecard policy requiring them to sign in and out upon arriving at and departing from work. *Id.* at 101. Andersen's report noted with understatement that "[f]ailure to adhere to this policy creates a potential for [time and attendance] fraud." *Id.* Another agency policy limited each employee to 24 hours of overtime in a two-week pay period, but line staff were observed "consistently exceeding the 24-hour limit by averaging 30–60 overtime hours per pay period." *Id.* at 102.

<sup>227</sup> See White et al., *supra* note 50, at 416 (expressing the frustration of Donna Wulkan, co-counsel to the *Jerry M.* plaintiffs, that the institutions relied heavily on overtime while lacking resources needed to hire more staff).

<sup>228</sup> Engel, *supra* note 157, at A1 (quoting Mayor Marion Barry making this point).

<sup>229</sup> See also MILLER, *supra* note 6, at 98–103 (describing administrative and political responses to staff-aided escapes from Massachusetts reform schools).

<sup>230</sup> E.g., Sari Horwitz & Elsa Walsh, *Escape of 12 Teen Offenders Probed*, WASH. POST, Feb. 19, 1987, at C6 (quoting a department director saying, "I have some questions about how alert the staff on the bus was at the time" that three youths escaped through a window).

<sup>231</sup> Cf. Sabel & Simon, *supra* note 93, at 1077–80 (discussing litigation's "stakeholder effects" and illustrating examples in which the emerging stakeholders act in ways that advance the lawsuit's goals).

<sup>232</sup> Elsa Walsh, *Four More Youths Flee From Oak Hill Facility*, WASH. POST, Sept. 27, 1986, at B3. But cf. *id.* (quoting a named staff member who discounted the theory of staff assistance and said the youths involved "just want to go home").

managers or a court) who have destabilized the institutional order.<sup>233</sup> Actors who destabilize a system are obvious objects of opposition from other actors whose stability is threatened.<sup>234</sup> Seen from this perspective, escapes are an effective means of destroying reformers' credibility and undermining their political support. In one especially embarrassing episode, a youth escaped from New Beginnings one day after a ribbon-cutting ceremony at which Mayor Adrian Fenty called it "one of the best rehabilitative facilities in the country."<sup>235</sup> Determining exactly which employees were responsible is typically difficult and time-consuming, especially compared to the immediacy of negative coverage.<sup>236</sup> And it may be impossible to determine whether a particular escape was caused by staff sabotage, or by overcrowding and staffing shortages—both of which are well beyond staff control.

These anecdotes suggest that some line staff have a perceived interest in undermining changes without regard to whether management or a court ordered them.<sup>237</sup> But it cannot be forgotten that there are also staff members who embrace new approaches and offer valuable ideas about improvement.<sup>238</sup> One evaluation of the DYRS reforms found that, while "many staff were supportive of the new therapeutic model, and many were opposed to it, [interviews and focus groups] also revealed a large majority who fell somewhere in between the two extremes."<sup>239</sup> Developing

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<sup>233</sup> See Sabel & Simon, *supra* note 93, at 1062 (conceiving of public law litigation as a means of enforcing a right to destabilize a public institution controlled by entrenched interests); see also *id.* at 1064–65 (mentioning the influence of regulatory capture theory on the theory of public law litigation).

<sup>234</sup> See, e.g., White et al., *supra* note 50, at 412 (recognizing "the issue of the city employees whose jobs would be in jeopardy because, in a sense, the [deinstitutionalization] plan is establishing private nonprofit organizations," and proposing that existing staff be retrained to work in community-based alternatives).

<sup>235</sup> Darryl Fears, *Inmate Escapes New Jail for Youths*, WASH. POST, June 1, 2009, at B1.

<sup>236</sup> E.g., Paul Duggan, *D.C. Punishes Youth Center Employees for Escapes*, WASH. POST, July 10, 2009, at B1 (reporting, five weeks after an escape, that the department fired five staff and disciplined three supervisors for their actions, which the mayor described only vaguely as constituting a failure to "do everything they could have and should have done to prevent these escapes"). Though the employees' union representative had no comment on the firings, she derided the new facility as "Camp Cupcake." *Id.*

<sup>237</sup> See MILLER, *supra* note 6, at 98 ("Staff-stimulated incidents are not meant to demonstrate the uncommon incorrigibility, violence, or character of the staff but of the inmates—inmates clearly in need of stricter regimens.").

<sup>238</sup> See, e.g., Chico Harlan, *Leap of Faith*, WASH. POST MAG., Oct. 21, 2007, at W12 (profiling an Oak Hill recreation counselor who requested and received permission to take eight committed youths on a camping and rafting trip to the Grand Canyon as a reward for their good behavior).

<sup>239</sup> DALY ET. AL, *supra* note 47, at 22–23.

constructive relationships with line staff is essential to implementing a reform effort seeking to remake an institution's culture.<sup>240</sup> And, most importantly for present purposes, courts cannot assume that staff members do only what they are told.<sup>241</sup>

In this light, one must question whether highly detailed orders make a constructive contribution to the creative task of building a new, rehabilitative juvenile corrections agency.<sup>242</sup> In *Jerry M.*, the need to measure compliance with the consent decree imposed administrative burdens that distracted from staff's work with youths.<sup>243</sup> More importantly, mandating a level of performance measured by detailed standards may be appropriate when the agency is holding itself to the wrong standards. But when the problem is that a chaotic institution casually inflicts intolerable suffering on the youths it is supposed to protect, imposing higher or more specific standards for conduct is more likely to compound the failure than to spur reform.<sup>244</sup> This compound failure can itself become an obstacle to reform; in Schiraldi's view, "the law suit and judicial oversight served to contribute to an atmosphere of profound learned-helplessness, with staff

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<sup>240</sup> See AMANDA B. CISSNER & DONALD J. FAROLE, JR., CTR. FOR COURT INNOVATION, AVOIDING FAILURES OF IMPLEMENTATION 6 (June 2009), available at [http://www.courtinnovation.org/\\_uploads/documents/FailureFinal.pdf](http://www.courtinnovation.org/_uploads/documents/FailureFinal.pdf) (discussing approaches to gaining line staff's acceptance of correctional reforms); see also, e.g., DALY ET AL., *supra* note 47, at 27 (noting agency management's periodic efforts to engage DYRS staff).

<sup>241</sup> See Schiraldi, Remarks, *supra* note 65, at 7 ("[T]he legal system and the courts believe that if something is simply ordered, it must be done, which is completely the opposite of my experience with large government bureaucracies.").

<sup>242</sup> E.g., *Jerry M. v. District of Columbia*, C.A. No. 1519-85 (D.C. Super. Ct. Apr. 15, 2004) (Order VIII) at 9 (finding the District in contempt for failure to show, inter alia, compliance with a consent decree provision requiring the District "to assure that the assigned Treatment Team takes primary responsibility for developing the [youth's Individual Service Plan], assisted by diagnostic staff," apparently because the diagnostic staff members assumed too much of this responsibility); see also SILVERSTEIN, *supra* note 113, at 15 (proposing a framework for evaluating the relative risks and rewards of establishing public policy goals through "juridification").

<sup>243</sup> E.g., ANDERSEN, *supra* note 58, at 82 (stating case managers' view that unrealistic deadlines for assessments and treatment plan reviews required them to be "paper processors" rather than clinicians," and recommending negotiations with the plaintiffs to amend these requirements); cf. Malcolm M. Feeley & Edward Rubin, *Prison Litigation and Bureaucratic Development*, 17 LAW & SOC. INQUIRY 125, 145 (1992) (arguing that a strong bureaucracy protects inmate rights).

<sup>244</sup> See Schiraldi, Remarks, *supra* note 65, at 3-4 ("Staff themselves had become institutionalized and numb to the impact of the daily indignities foisted upon the young people by day-to-day exposure to such inhumane conditions.").



fully believing that there was nothing that could be done to pull the department out of its downward spiral.”<sup>245</sup>

Though line staff may not be high enough on the organizational chart to be named defendants,<sup>246</sup> a court can take constructive actions aimed at promoting reform through improvements in the line staff. A court might order the agency to adopt higher training or educational requirements on the workforce<sup>247</sup> or, somewhat more drastically, suspend civil service job security protections to the extent they interfere with the constitutional rights of incarcerated youths. Even changes to seemingly unrelated processes (such as the authorization of overtime hours) can have the effect of disrupting the status quo so that a new workplace culture can take hold. On the other hand, a court may justifiably believe that these kinds of changes are best left to the executive and legislative branches.<sup>248</sup>

### C. JUDGES

In other institutional reform litigation contexts, there may be some reason to consider “the court”—meaning the individual judge presiding over the class action—as the only relevant personification of judicial power.<sup>249</sup> But *Jerry M.* presents a very different context, in which a family division judge manages a consent decree governing correctional facilities while other family division judges continuously order delinquent youths to the same facilities.<sup>250</sup> Occasional appeals from orders of the *Jerry M.* trial

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<sup>245</sup> *Id.* at 8.

<sup>246</sup> The *Jerry M.* defendants are the D.C. Government (including, in their official capacities, seven individuals from the Mayor to the superintendents of the District’s three secure facilities and their successors in office) and the D.C. Public Schools (including, in their official capacities, the superintendent and head of special education). *Jerry M.* Consent Decree, *supra* note 2, at 40–41.

<sup>247</sup> See ANNIE E. CASEY FOUND., ISSUE BRIEF, *supra* note 81, at 6 (urging federal funding for incentives designed to attract college-educated workers into juvenile justice systems, and noting the presence of such incentives in child welfare).

<sup>248</sup> See DALY ET AL., *supra* note 47, at 27–30 (recommending that DYRS management develop and maintain strong relationships with line staff, further enhance staff training, and integrate school staff and therapists into other activities).

<sup>249</sup> See, e.g., SILVERSTEIN, *supra* note 113, at 15 (considering “the courts” as an alternative to the traditional political process).

<sup>250</sup> Although the *Jerry M.* plaintiffs raised constitutional claims, they filed their complaint in D.C. Superior Court rather than federal court. See text accompanying *supra* notes 16–22. Given the history of judicial interventions described in this Section, the plaintiffs likely believed that local judges would be receptive to the complaint. The local forum also avoids problems that might have arisen after the federal Prison Litigation Reform Act or the Supreme Court’s decision in *Horne*. See text accompanying *supra* notes 118–20 & 162.

judge involved yet another set of judges from the D.C. Court of Appeals. Even the phrase “*Jerry M.* trial judge” means the three different judges who at some point presided over *Jerry M.* during its twenty-six years and counting.<sup>251</sup> This “plurality” of judges—i.e., the reality that multiple judges influence the same public policy at the same time—complicates juvenile conditions litigation, especially when different judges have different visions of the juvenile justice system’s purpose.<sup>252</sup>

As a consequence, there exists a potential for great tension between judges and reform. Two potential sources of conflict stand out. First, family court judges have equitable powers that allow them to affect broader policies of juvenile justice through the disposition of a single delinquency case. However, the principles of equity provide no clear rules to channel the judges’ powers to do justice by acting “in the best interests of the child.”<sup>253</sup> When a judge’s equitable order interferes with another judge’s order, the conflict can deprive judicial action of coherence. Second, in practice a consent decree as detailed as the one in *Jerry M.* operates as a contract, the terms of which differ from the government’s duties under any relevant statutes and the Constitution.<sup>254</sup> Even at times when the District, under Schiraldi’s leadership, adopted a reform agenda that transcended the decree’s requirements, the *Jerry M.* court only concerned itself with the District’s obligations under the consent decree.<sup>255</sup> Far from preserving equity’s essential flexibility, formalistic insistence on compliance with the decree can become self-defeating.<sup>256</sup>

Putting *Jerry M.* aside momentarily, it is helpful to set out the extent, and the limits, of the power D.C.’s family court judges have. In the

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<sup>251</sup> See White et al., *supra* note 50, at 411 (noting that the first judge, Ricardo M. Urbina, accepted an appointment to the federal bench and was succeeded by Judge Richard A. Levie). Currently, Judge Herbert B. Dixon presides over the case. See, e.g., *Jerry M. v. District of Columbia*, C.A. No. 1519-85 (D.C. Super. Ct. May 13, 2004).

<sup>252</sup> See ARENDT, *HUMAN CONDITION*, *supra* note 66, at 7 (“[M]en, not Man, live on earth and inhabit the world. While all aspects of the human condition are somehow related to politics, this plurality is specifically *the* condition—not only the *conditio sine qua non*, but the *conditio per quam*—of all political life.”).

<sup>253</sup> D.C. CODE § 16-2320(c) (LexisNexis 2001) (authorizing the judge to choose among various remedial dispositions after a child has been adjudicated delinquent or in need of supervision). For the *Jerry M.* judge’s views of this issue, see *infra* note 259.

<sup>254</sup> See Sandler & Schoenbrod, *supra* note 11, at 117, 122.

<sup>255</sup> See, e.g., *supra* text accompanying note 286.

<sup>256</sup> See *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944) (“The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs . . .”).

District, the court orders a youth who is detained awaiting trial to a placement, whether a secure facility or a community-based alternative.<sup>257</sup> After adjudicating a youth delinquent, the court places the youth in the custody of DYRS and loses all control over his subsequent placement; the agency has discretion to make the most appropriate available placement.<sup>258</sup> Further, in delinquency and abuse or neglect proceedings, family division judges often face dilemmas in evaluating a child's needs and ordering appropriate relief, especially when the judges lack experience in the subject matter and when they do not trust the social workers and probation officers to ascertain or act in the best interests of children.<sup>259</sup>

Upon its filing, the *Jerry M.* case was assigned to Hon. Ricardo Urbina, the presiding judge of the family division in D.C. Superior Court. Judge Urbina was also the coauthor of a contemporaneously published manual for new juvenile court judges; this manual provides some insight into Judge Urbina's views—including his belief that a judge new to the family division docket would feel that legal training and professional experience had been poor preparation for the job.<sup>260</sup> The manual begins with a hypothetical case:

"Michael" is a 13 year old who has been in foster care since age 6 when his mother's boyfriend abused him. Michael is before the court for disposition of his first offense—he pled guilty to setting fire in his foster home. He has been returned to his mother several times, but a second abusive boyfriend and her subsequent eviction and transient life among friends and homeless shelters have resulted in his removal. Michael is bright but frequently fights in school. He is described by his worker as being "sad, lonely, and fearful with a hot temper." The defense attorney says Michael wants to live with his mother, and recommends closing the delinquency case. The prosecutor feels that Michael is dangerous and unpredictable and wants him committed as a delinquent, although he is too young for the juvenile institution. The neglect worker wants him out of that system because she can't handle a "criminally-

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<sup>257</sup> See D.C. CODE § 16-2310.

<sup>258</sup> See *In re P.S.*, 821 A.2d 905, 907 (D.C. 2003) (holding that the court lacks statutory authority to direct the treatment and placement of a delinquent youth who has been committed to the agency's custody).

<sup>259</sup> See MARGARET BEYER & RICARDO URBINA, AN EMERGING JUDICIAL ROLE IN FAMILY COURT 1-2 (1986). Coauthor Beyer was one of three experts on a panel created by the *Jerry M.* consent decree to design a continuum of care needed to reduce the number of youths held in secure confinement. See *District of Columbia v. Jerry M.*, 571 A.2d 178, 179 n.1, 181 (D.C. 1990).

<sup>260</sup> See BEYER & URBINA, *supra* note 259, at 39 ("Judges wanting to keep within the mainstream of judicial thinking find that common law, statutes, and caselaw provide insufficient guidance about the limits of their mandate to protect the best interest of the child.").

inclined adolescent.” The probation officer thinks Michael is emotionally disturbed and recommends special placement.<sup>261</sup>

What is the judge to do?<sup>262</sup> The extent of the judge’s involvement in an individual child’s case is often a matter of judicial discretion and philosophy, with the typical judge becoming more involved when the workers appear less competent.<sup>263</sup> In the course of ordering and supervising the government’s provision of services in the best interests of the child, a judge can self-consciously drive policy changes in service provision overall.<sup>264</sup> Thus, experience in the family division can prime a judge for ordering dramatic interventions aimed at broad change.<sup>265</sup>

Indeed, the history of judicial intervention to improve conditions of secure confinement for the District’s incarcerated youths is much older than *Jerry M.*, and this history reveals a desire among some judges to drive systemic changes.<sup>266</sup> The most far-reaching intervention began after a day in which four separate juveniles alleged in Judge Gladys Kessler’s courtroom that they had been victims of serious mistreatment during their confinement at Cedar Knoll.<sup>267</sup> Acting on her “plain duty to discover what

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<sup>261</sup> *Id.* at 1–2; see also Emily Buss, *Failing Juvenile Courts, and What Lawyers and Judges Can Do About It*, 6 NW. J. L. & SOC. POL’Y 318 (2011) (decrying the absence of a meaningful role for the child in hearings like this one).

<sup>262</sup> In at least one respect, this is a simple case because the youth is both culpable and in need of services. See Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. KY. L. REV. 257, 284, 293 (2007) (arguing that juveniles’ advocates are more likely than those of adults to be ineffective, “juvenile court culture frowns upon zealous advocacy,” and juvenile defendants are more likely to plead guilty without understanding the meaning or consequences of a plea). Delinquency is sometimes used as a tactic to secure services that are otherwise unavailable. See ANNIE E. CASEY FOUND., ISSUE BRIEF, *supra* note 81, at 5 (“Juvenile courts and corrections systems have become a dumping ground for youth with mental health problems, abuse and neglect histories, and learning disabilities who should be served by public systems with specialized expertise in addressing these problems.”); BLUE RIBBON COMM’N ON YOUTH SAFETY & JUVENILE JUSTICE REFORM IN D.C., FINAL REPORT 20 (Nov. 6, 2001) [hereinafter BLUE RIBBON COMM’N], available at <https://blogs.commonsgorgetown.edu/oakhill/documents-and-resources/blue-ribbon-commission/> (referring to “[t]he apparent excessive use of commitment as a strategy to secure services”).

<sup>263</sup> See BEYER & URBINA, *supra* note 259, at 3, 30.

<sup>264</sup> See *id.* at 30 (illustrating how judges can “include making systemic changes part of their role” by issuing careful directives to social workers and probation officers).

<sup>265</sup> For a sample of remedial orders issued in *Jerry M.*, see *supra* text accompanying notes 50–57.

<sup>266</sup> See, e.g., *United States v. Alsbrook*, 336 F. Supp. 973, 979, 982–83 (D.D.C. 1971) (requiring the construction of an additional facility for incarceration of young adults up to age twenty-two, in order to alleviate overcrowding and provide for rehabilitation).

<sup>267</sup> *In re An Inquiry Into Allegations of Misconduct Against Juveniles Detained at and Committed at Cedar Knoll Inst.*, 430 A.2d 1087, 1088–89 (D.C. 1981). The four juveniles

is happening to the children” and declaring that the allegations described a “horror . . . almost beyond belief,” Judge Kessler convened six fact-finding hearings over a seven-month period.<sup>268</sup> At the end of the inquiry, Judge Kessler issued “a comprehensive order mandating sweeping changes” at the secure facilities.<sup>269</sup> The District appealed the order, arguing that the trial court exceeded its authority and that the evidence from the hearings did not warrant the order.<sup>270</sup> Mindful of separation of powers concerns and noting that the District had since released the four youths from its custody, the D.C. Court of Appeals vacated Judge Kessler’s order for want of jurisdiction.<sup>271</sup>

While *Jerry M.* was underway 1994, another judge intervened on behalf of youths held for overnight stays at the Receiving Home for Children pending their initial appearances.<sup>272</sup> Following seven youths’ claims that they were given little or no food during a weekend stay, Judge George W. Mitchell made a personal, unannounced visit to the Receiving Home.<sup>273</sup> City lawyers believed they had successfully rebutted the youths’ allegation, but Judge Mitchell found the conditions “unacceptable for a civilized country.”<sup>274</sup> He ordered its nearly immediate closure, giving the District one week to provide for the custody of arrested youths on nights and weekends.<sup>275</sup> But Judge Mitchell was not acting in a closed universe.

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“recounted incidents of physical abuse and sexual assaults by counselors; physical attacks and beatings by other juveniles which are allowed to occur because of inadequate supervision; drug abuse by both students and counselors and distribution of narcotics to students by counselors; administration of prescription drugs by untrained personnel; and, instances where juveniles who were clearly in need of medical attention were denied access to treatment by counselors.” *Id.* at 1089.

<sup>268</sup> *Id.* at 1089 (quoting trial court order of Sept. 26, 1977). Without certifying a class of plaintiffs, Judge Kessler appointed the Public Defender Service to represent all juveniles confined in the facility for the inquiry’s purposes. *Id.* at 1088, 1089.

<sup>269</sup> *Id.* at 1088.

<sup>270</sup> *Id.* at 1090.

<sup>271</sup> *Id.* at 1090–92; *see also id.* at 1094 (Ferren, J., dissenting) (“In calling this case moot, my colleagues would force the trial court into the untenable position of either having to place a child in an inhumane facility while ordering the conditions improved, or of removing the child and allowing the conditions that forced the removal to go uncorrected.”).

<sup>272</sup> *E.g.*, Lubow & Tulman, *supra* note 202, at xx.

<sup>273</sup> Nancy Lewis, *D.C. Judge Orders Shutdown of Children’s Receiving Home*, WASH. POST, Aug. 18, 1995, at B1. At the time, Judge Mitchell was the head of the Family Division. *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> Judge Mitchell required that a replacement facility include “[a] place for the children to eat other than in their hands and with their fingers” and a “place where the food can be placed other than the floor.” *Id.* (quoting Judge Mitchell’s order). “This place, where you

With the Receiving Home shuttered, the District kept children at Oak Hill pending initial appearance; as a result, Oak Hill's daily population swelled above the limit ordered in *Jerry M.*, and the District incurred more fines for contempt.<sup>276</sup>

At other times, judges advanced policies in direct conflict with key *Jerry M.* goals. For example, the *Jerry M.* lawsuit is partly an effort to end the District's unnecessary overconfinement of youths who did not warrant secure placements.<sup>277</sup> Yet as DYRS sharply reduced the duration of secure confinement for lower-level offenders, some judges balked; they brought their views in private to city councilmembers, who interrogated Schiraldi about the new policy at a public hearing.<sup>278</sup> Additionally, although the Juvenile Detention Alternatives Initiative (JDAI) sought judges' participation in establishing standards defining the limited cases in which secure detention is appropriate,<sup>279</sup> individual judges were apparently able to disregard the standards.<sup>280</sup> To be fair, the judges expressed concern that the continuum of less restrictive, community-based placements "was not fully implemented as designed and . . . as a result, youth in the community were not getting the needed range of services."<sup>281</sup> But despite the availability of forums such as JDAI, tension between the two groups was a significant obstacle to successful implementation of new initiatives.<sup>282</sup> Judges and DYRS management reported that "they often had different views about how to best serve youth, . . . the types of youth that are most in need of secure placement, and the adequacy of the placement options."<sup>283</sup>

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are keeping these children, is appalling and is unfit to house animals of a lower level,' Mitchell said, his voice rising with revival fervor." *Id.*

<sup>276</sup> See RYAN & SCHINDLER, *supra* note 208, at 17.

<sup>277</sup> *Jerry M. Complaint*, *supra* note 18, at 51–52; see *supra* text accompanying notes 23–27.

<sup>278</sup> See Pierre, *supra* note 153, at B1 (describing how Schiraldi "was summoned before the council's Committee on Human Services to answer questions raised, mostly in private, by judges, prosecutors and community groups about whether his agency was releasing youths too soon").

<sup>279</sup> See MENDEL, TWO DECADES OF JDAI, *supra* note 208, at 26.

<sup>280</sup> See DEP'T OF YOUTH REHAB. SERVS. (D.C.), *supra* note 201, at 2 ("The number of commitments in 2005 vastly exceeded the 2004 total of 144, even though there was a decrease in the number of juvenile arrests. The increase appears largely to have resulted from the high levels of commitments by one judge sitting for the first time on juvenile cases in the past year and a half.").

<sup>281</sup> DALY ET AL., *supra* note 47, at 19.

<sup>282</sup> *Id.* at 21 (stating that trust eroded after the city council enacted a law, which DYRS did not seek, and that judges resented because it limited their authority to order specific types of placements).

<sup>283</sup> *Id.* at 20.

For the sake of argument, I assume that the judges' dim view of the DYRS community-based alternatives is accurate.<sup>284</sup> But why? Although Schiraldi never offered *Jerry M.* as an excuse, he did characterize it as a major distraction.<sup>285</sup> After noting that one of his first acts as director was to pay a massive sum of overdue contempt fines, Schiraldi said:

[F]rankly, if I could have paid \$3.6 million and the lawyers and the monitor would have just gone away and allowed me to set my own priorities, it would have been a bargain. The lawsuit forced me to focus more on the minutia of improving conditions over deinstitutionalization and the creation of a workable network of community programs. The litigants, none of whom were managers, never understood that in a system that deep in a hole, it was impossible to prioritize all fronts simultaneously. Given choices, they would consistently prioritize what they knew best and where the law provided the most readily available remedies—conditions issues—despite the fact that most of them admitted that the institution-based system was itself inherently flawed and that the remedy most needed was watershed change and deinstitutionalization, not a new coat of paint on a failed, institutional model.<sup>286</sup>

Of course, such a statement must be considered in light of the long experience of the lawsuit. Once the *Jerry M.* judge observed that orders and threats of even worse punishment were the only tools that seemed to have any effect, it would be natural to respond with increasingly specific orders.<sup>287</sup> And some of the *Jerry M.* requirements—most prominently, the straightforward mandate to close Cedar Knoll by December 1, 1987—afforded the District a great deal of flexibility, which it failed to use advantageously.<sup>288</sup> Perhaps the best approach for the court presiding over an institutional reform lawsuit is to be decisive and general on *what* must be achieved, while remaining flexible on *how* it will happen.<sup>289</sup>

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<sup>284</sup> See Colbert I. King, Op-Ed, *Released, Yes. Rehabilitated, Not So Much.*, WASH. POST, Oct. 25, 2008, at A15 (charging that under Schiraldi, DYRS prematurely released offenders who had not been rehabilitated and then inadequately supervised them in the community). King, whose frequent columns on juvenile justice often expressed the views shared by some judges, also believed DYRS badly erred in limiting the size of New Beginnings to sixty beds. *See id.*

<sup>285</sup> See Schiraldi, Remarks, *supra* note 65, at 6.

<sup>286</sup> *Id.*

<sup>287</sup> See *Dixon v. Barry*, 967 F. Supp. 535, 551 (D.D.C. 1997) (structural reform litigation involving the District's mental health system) ("[T]he repeated failure of the District to comply with the court's orders eliminates any basis for judicial restraint when remedying noncompliance."); Holland & Mlyniec, *supra* note 19, at 1823–24 (discussing *Jerry M.*).

<sup>288</sup> See *supra* note 29 and accompanying text.

<sup>289</sup> See DiIulio, *What Judges Can Do*, *supra* note 91, at 308 (describing the approach of Judge Lasker to a prison lawsuit in New York City).

## D. MEDIA

Of course, the press is not charged with implementing juvenile justice reform.<sup>290</sup> But public perceptions of the juvenile justice system (and politicians' beliefs about these perceptions) frame the ways in which politicians act towards the juvenile justice system.<sup>291</sup> These political attitudes remain vitally important even when an institution is involved in a lawsuit.

Through the news media, an institutional reform lawsuit brings public attention to the conditions that are the basis of the suit.<sup>292</sup> Potentially, this attention gives institutional reform plaintiffs a second path to success: even if the lawsuit does not reform the system directly, the litigation can succeed by generating news coverage that prods political leaders to pursue reform on their own.<sup>293</sup> As one public defender put it, a conditions lawsuit and in-depth investigative reporting bring public attention to "the horrible things we do to children incarcerated at facilities with pleasant-sounding names such as 'Cedar Knoll' on 'Jolly Acres Road' and the 'Oak Hill Youth

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<sup>290</sup> *But see* NEUSTADT, *supra* note 139, at 28–29 (positing that, because executive power is a matter of persuasion rather than command, "[m]any public purposes can only be achieved by voluntary acts of private institutions; the press, for one . . . , is a 'fourth branch of government'") (citing DOUGLAS CATER, *THE FOURTH BRANCH OF GOVERNMENT* (1959)).

<sup>291</sup> BARRY KRISBERG ET AL., NAT'L COUNCIL ON CRIME & DELINQUENCY, *YOUTH VIOLENCE MYTHS AND REALITIES: A TALE OF THREE CITIES* 12–13 (Feb. 2009), *available at* [http://www.aecf.org/~media/PublicationFiles/Casey Youth ReportFinES.pdf](http://www.aecf.org/~media/PublicationFiles/Casey%20Youth%20ReportFinES.pdf) (finding that in the District, "newspapers highlighted crime increases and often call for a quick response from city leaders," who responded with emergency legislation imposing a 10 p.m. youth curfew, giving police access to confidential juvenile records, and denying bail for certain alleged offenses); *see also* Tanenhaus & Drizin, *supra* note 75, at 642–43 (summarizing the 1980s and 1990s trend toward sensationalizing crimes committed by remorseless juvenile superpredators and the effect of this reporting on nationwide adoption of laws facilitating the prosecution of youth offenders in adult criminal courts). Tanenhaus and Drizin charge that the mainstream media has perpetuated a myth that juvenile courts were never designed for serious violent crime. *See id.* at 644. Their review of recently rediscovered records of 11,000 homicides in Chicago between 1870 and 1930 shows that early juvenile courts adjudicated murder cases. *See id.* at 648–49 (citing *HOMICIDE IN CHICAGO 1870–1930*, <http://homicide.northwestern.edu/> (last visited Oct. 31, 2012)).

<sup>292</sup> *See* Sturm, *supra* note 95, at 670 ("Litigation has also generated considerable media coverage of prison conditions. Virtually every case study reports extensive media coverage of the litigation and the conditions and practices in the targeted institutions." (citations omitted)).

<sup>293</sup> *See id.* (stating that, in the adult prison context, news coverage of litigation "is widely credited with increasing public awareness of the inadequacies in correctional institutions and acceptance of the need for reform").



Center.”<sup>294</sup> Yet the public attention may come to focus on issues other than those most important to the lawsuit. Further, there are no guarantees that media coverage will remain favorable to reformers as they implement a decree, especially if doing so entails politically controversial action.

Since the beginning of *Jerry M.*, there has been no shortage of stories informing the public of the problems in the District’s juvenile justice agency.<sup>295</sup> But once that story has been told, it is no longer novel; reporters searching for scoops must either dig deeper or look elsewhere. Updates on the litigation’s progress can certainly be newsworthy; however, after the parties have agreed to a consent decree, coverage of litigation is likely confined to implementation failures, not successes.<sup>296</sup> Later news coverage of the District’s agency shifted focus to assessing the lawsuit’s impact on city hall politics.<sup>297</sup> At one point, *Jerry M.* was a story of improper government contracting;<sup>298</sup> at another, of a judge’s dramatic request for a meeting with the mayor.<sup>299</sup> While valuable as news reporting, stories on such side issues are unlikely to spur politicians to embark on ambitious institutional reforms. Such stories also divert attention from the persistence of intolerable conditions in facilities and the merits of deinstitutionalization.

Further, negative media coverage can quickly undercut political support for reform.<sup>300</sup> In the District, media coverage of escapes, whether

<sup>294</sup> Diane Shust, Op-Ed, *They Call It ‘Juvenile Justice,’* WASH. POST, Nov. 30, 1986, at C8.

<sup>295</sup> After plaintiffs filed the original complaint and before the parties agreed to the consent decree, the *Washington Post* ran a two-part, front-page series of thoroughly reported stories. See Weiser, *Delinquents*, *supra* note 222; Weiser, *Youth Facility Policy*, *supra* note 79.

<sup>296</sup> The news reports cited throughout this Comment support this point. For a rare story on a positive development in the litigation, see Henri Cauvin, Blog, *Improved Juvenile Ward Education: D.C. Report*, WASH. POST (Jul. 8, 2010, 2:20 PM), [http://www.washingtonpost.com/blogs/crime-scene/post/improved-juvenile-ward-education-dc-report/2010/12/20/ABFPCDG\\_blog.html](http://www.washingtonpost.com/blogs/crime-scene/post/improved-juvenile-ward-education-dc-report/2010/12/20/ABFPCDG_blog.html) (“In a new report filed today, the monitor overseeing a court-ordered reform of the District’s juvenile justice agency said the city had has [*sic*] staged a ‘remarkable’ turnaround in how it educates juveniles in long-term detention.”).

<sup>297</sup> See, e.g., Sandra Evans, *City Hall Notebook: Budget Bodes Ill for Unfortunates in City Institutions*, WASH. POST, Feb. 6, 1986, at DC1 (noting the folly of a budget proposal that defunded all operations at Cedar Knoll—which the city had committed to close—and failed to create any alternatives).

<sup>298</sup> E.g., Benjamin Weiser, *Youth Contracts Kept Despite Allegations*, WASH. POST, June 27, 1986, at B1.

<sup>299</sup> E.g., Lewis, *supra* note 57.

<sup>300</sup> Schiraldi, Remarks, *supra* note 65, at 5 (“The press became a serious problem over time. Although we got uniformly terrific press initially, and some members of the media like the Post’s editorial board and the Kojo Nnamdi show were consistently supportive

staff-aided or not, repeatedly undermined confidence in agency management.<sup>301</sup> So did coverage of sensational crimes involving youths who had been at one time or another in DYRS custody.<sup>302</sup> Part IV.G tells a story in which relentless media criticism influenced a political decision to replace reform-minded agency management.

When reformers are in the position of agency management, they face a twofold public relations problem. First, so long as they remain subject to the control of the political branches, they cannot afford to lose public support or allow public attitudes favoring incarceration to overwhelm those receptive to rehabilitation.<sup>303</sup> Second, reformers can expect negative news coverage of their failures, but juvenile confidentiality laws may constrain the agency's ability to respond effectively to bad-news stories.<sup>304</sup>

In summary, an agency can earn positive news coverage of its successes outside the corrections lawsuit, but such stories by their nature will appear with less frequency.<sup>305</sup> Plaintiffs in juvenile justice litigation should not expect media coverage over the long run to favor reform over institutionalization.

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throughout my tenure, all you have to do is 'google' my name to get a sense of some of the negative press I received during my time at DYRS, coverage which colors the 'verdict' on the reforms to this day.").

<sup>301</sup> E.g., Colbert I. King, Op-Ed, *A Grieving Mother Left in the Dark*, WASH. POST, June 26, 2010, at A15 (decrying the department's supervision of youths in community-based placements); Elsa Walsh, *Crawford Sharply Criticizes Youth Facilities*, WASH. POST, Sept. 25, 1987, at C1 (reporting that a key legislator "sharply criticized" management in response to a report that 25% of youths escaped secure confinement at Oak Hill).

<sup>302</sup> E.g., King, *supra* note 301, at A15 (reporting that a murder victim's mother said, "DYRS 'is a breeding ground for vile offenders to freely walk away and commit some of the most unspeakable crimes imaginable.'").

<sup>303</sup> See KRISBERG ET AL., *supra* note 291, at iv-v (finding complexity in public opinion toward youth rehabilitation and observing that media coverage has a large influence on attitudes toward youth offenders).

<sup>304</sup> E.g., Editorial, *Secrecy Run Amok*, WASH. POST, June 22, 2010, at A18 (referring to a murder case in which "Maryland authorities released arrest records of the three suspects charged . . . while D.C. officials were constrained in even acknowledging the youths were under the supervision of youth rehabilitation services"); see also Drizin & Luloff, *supra* note 262, at 309 (arguing that the absence of media observers from juvenile proceedings contributes to an incorrect public perception that "the juvenile court is a place where children are not punished and [are] allowed to commit crimes without any repercussions").

<sup>305</sup> Harlan, *supra* note 238 (profiling a group of DYRS youths during an eight-day wilderness trip, and noting that the newspaper agreed not to publish information about the youths' offenses).

## E. THE LEGISLATURE

In an influential article on the politics of criminal law, the late Professor Stuntz distinguished “surface politics,” which lead legislatures to react to the ebb and flow of public opinion, from “deep politics,” in which legislatures cooperate and compete with other governmental institutions.<sup>306</sup> Stuntz argued that only deep politics—specifically, an institutional alliance of legislators and prosecutors that appellate courts cannot resist—truly explains the continuous expansion of the criminal law since the mid-nineteenth century.<sup>307</sup>

Stuntz recognized only two major exceptions to criminal law’s expansion: the repeal of Prohibition and the criminal code revisions inspired by the Model Penal Code.<sup>308</sup> But we should rank the advent of juvenile justice as a third exception. Ever since legislatures created the first juvenile courts, juvenile justice has stood uncomfortably alongside criminal law.<sup>309</sup> The states’ juvenile court acts substantially narrowed criminal law’s scope when they insulated children from the cruelty of criminal punishment for their criminal acts. It is no accident that an entire species of modern tough-on-crime legislation—the transfer laws embodying the sound bite “adult time for adult crimes”—consists of expanding criminal law’s scope by eroding juvenile court jurisdiction.<sup>310</sup> The political “accident” is that criminal law reformers (including some crucially important trial judges, running with the *parens patriae* doctrine) created juvenile justice systems in the first place.<sup>311</sup>

Quibbles aside, Stuntz’s analysis remains penetrating. His distinction between surface politics and deep politics guides the following discussion.

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<sup>306</sup> See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509–10 (2001).

<sup>307</sup> *Id.* at 525, 528.

<sup>308</sup> *Id.* at 525 n.93.

<sup>309</sup> See Tanenhaus & Drizin, *supra* note 75, at 645–49; see also Scott R. Hechinger, *Juvenile Life Without Parole: An Antidote to Congress’s One-Way Criminal Law Ratchet?*, 35 N.Y.U. REV. L. & SOC. CHANGE 408, 444–64 (2011) (arguing that, in the current political climate, it is possible for congressional action to spur an important reform of youth-crime policy).

<sup>310</sup> See Tanenhaus & Drizin, *supra* note 75, at 664–66.

<sup>311</sup> See Gwen Hoerr McNamee, *The Origin of the Cook County Juvenile Court*, in A NOBLE SOCIAL EXPERIMENT? THE FIRST 100 YEARS OF THE COOK COUNTY JUVENILE COURT, 1899–1999, at 14, 18 (Gwen Hoerr McNamee ed., 1999); Hammer, *supra* note 87, at 928–30.

*1. Surface Politics*

Public opinion about youth crime is complex. In one poll, 91% of American voters agreed that youth crime “is a major problem in our communities,” and barely one-third felt the juvenile justice system was effective in getting youths to stop committing violent or nonviolent crimes.<sup>312</sup> Taken alone, these answers might suggest that getting tougher on youth crime would be popular with the public. But 89% agreed that “[r]ehabilitative services and treatment for incarcerated youth can help prevent future crimes.”<sup>313</sup> And when asked which policy responses are “highly effective” ways to reduce youth crime, voters favored rehabilitative approaches over tougher punishment.<sup>314</sup> Thus, the public appears to believe both that a serious youth-crime problem exists and that the best response entails far more than reflexive punishment.

Media portrayals can have as much effect on public perception of youth crime as actual youth-crime trends do.<sup>315</sup> In the District, youth crime received extensive media coverage beginning in 2003, when a series of high-profile crimes involved a wave of “kiddie car thieves” and fatal shootings by teens of innocent bystanders, including other teens.<sup>316</sup> Despite these high-profile crimes, the District’s youth-crime rate was dramatically lower in 2003 than it had been in the mid-1990s.<sup>317</sup>

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<sup>312</sup> BARRY KRISBERG & SUSAN MARCHIONNA, NAT’L COUNCIL ON CRIME & DELINQUENCY, ATTITUDES OF US VOTERS TOWARD YOUTH CRIME AND THE JUSTICE SYSTEM 2–3 (2007), available at [http://www.nccd-crc.org/nccd/pubs/zogby\\_feb07.pdf](http://www.nccd-crc.org/nccd/pubs/zogby_feb07.pdf). Zogby International conducted this telephone poll of 1,043 randomly selected voters using validated weighting and sampling procedures. The margin of error was +/- 3.1 percentage points. *Id.* at 2.

<sup>313</sup> *Id.* at 3.

<sup>314</sup> *Id.* at 6. The approaches are as follows (with the share rating them “highly effective” in parentheses): increasing education and job skills training for youths in the juvenile justice system (75%); increasing prevention services for youths in the community before they get in trouble (71%); increasing counseling and substance abuse treatment through the juvenile justice system (54%); harsher penalties for offenders under age 18 (33%); and prosecuting more youths in the adult criminal justice system (26%).

<sup>315</sup> See KRISBERG ET AL., *supra* note 291, at 2–3.

<sup>316</sup> RYAN & SCHINDLER, *supra* note 208, at 10; Sewell Chan, *Shooting Highlights Crime Debate*, WASH. POST, Nov. 9, 2003, at C1.

<sup>317</sup> JEFFREY A. BUTTS, URBAN INSTIT., JUVENILE CRIME IN WASHINGTON, D.C. 3 & tbl.1 (Dec. 2003), available at [http://www.urban.org/uploadedPDF/310910\\_JuvenileCrimeDC.pdf](http://www.urban.org/uploadedPDF/310910_JuvenileCrimeDC.pdf) (reporting that overall juvenile arrests increased in the District from 2002 to 2003, but the 2003 arrest figures still represented a 38% decrease in overall juvenile arrests since 1995). Butts’s report appeared in December 2003 as a reply to punitive policy responses to the youth-crime issue. See *id.* at 1–2. Examining data from 1995 to 2007 (with the benefit of hindsight), Krisberg found that the juvenile arrest rate for violent offenses had peaked at 529

But the initial legislative responses acted on the news, not the data.<sup>318</sup> Councilmembers proposed legislation to get tough on youth crime, for example by punishing parents of delinquent children.<sup>319</sup> Most prominently, Mayor Anthony Williams introduced an omnibus juvenile justice act.<sup>320</sup> The mayor's proposal incorporated a few of the reforms recommended in 2001 by his Blue Ribbon Commission on Youth Safety and Juvenile Justice Reform, but the bill also contained expansive provisions to make prosecuting youths in criminal court easier and to get tough on youth offenders and their parents.<sup>321</sup> The mayor's proposal received strong support from prosecutors, including both the District's corporation counsel and the United States Attorney's Office.<sup>322</sup>

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per 100,000 youths in 1996, bottomed out at 218 in 2002, and then rose before appearing to level off at 399 in 2007. KRISBERG ET AL., *supra* note 291, at 28–29.

<sup>318</sup> Cf. Paul H. Robinson et al., *The Modern Irrationalities of American Criminal Codes: An Empirical Study of Offense Grading*, 100 J. CRIM. L. & CRIMINOLOGY 709, 735 (2010) (arguing that the cumulative effect of legislative reactions to “some upsetting crime in the news” deprives criminal codes of coherence and rationality). Or, as another observer has put it, “there are far more bills introduced in every legislative session that need to die than need to pass.” ASHWORTH, *supra* note 5, at 3; *see id.* at 2–5 (explaining the dynamics of “bad ol’ bills” and the combination of benefits and low costs for legislators who sponsor them).

<sup>319</sup> E.g., Juvenile Justice and Parental Accountability Amendment Act of 2003, B. 15-460, §§ 2, 6 (introduced by Councilmember Chavous) (proposing, *inter alia*, to impose a mandatory fine on the parent of a delinquent child and to authorize the mayor to suspend the parent's driver's license depending on the severity of the offense or number of adjudications); *see also* Juvenile Justice Act of 2003, B. 15-574 (introduced by Councilmember Mendelson) (proposing procedural changes that would have the effect of transferring more youths to the criminal system).

<sup>320</sup> Omnibus Juvenile Justice, Victim's Rights and Parental Participation Act of 2003, B. 15-537 (introduced at the mayor's request).

<sup>321</sup> *Id.* In a scaled-back form, the mayor's bill adopted the commission's recommendations to add a purpose clause to the Juvenile Court Act; release “children in need of supervision” (i.e., truants and runaways) instead of incarcerating them; evaluate the effect of rehabilitative services on delinquent youths; and create individualized treatment plans for each delinquent youth. *Id.* at tit. I, IX–XI. The mayor's bill also proposed to allow prosecutors to share confidential information about juveniles; facilitate the transfer of juveniles accused of violent offenses to the criminal system; restrict judges' ability to dismiss delinquency cases when the child is not in need of rehabilitation; create a new juvenile offense for failing to appear at a delinquency hearing; grant victims the right to participate in a delinquency hearing; authorize courts to order delinquent juveniles or their parents to pay restitution; and require parents to participate in their children's rehabilitation plans, under pain of contempt. *Id.* at tit. III–IV, VI–VIII, XII; *see also* Letter from Anthony A. Williams, Mayor, D.C. to Linda W. Cropp, Chairman, Council of D.C. (Oct. 31, 2003) (accompanying the bill and explaining its rationale).

<sup>322</sup> COUNCIL OF D.C., COMM. ON THE JUDICIARY, REPORT ON BILL 15-527, “OMNIBUS JUVENILE JUSTICE AMENDMENT ACT OF 2004,” at 25–29, 31–34 (2004) [hereinafter “REPORT ON BILL 15-527”] (summarizing testimony from prosecutors). In the District, the U.S.

But the punitive legislation was opposed by a coalition of youth advocates who had successfully organized themselves earlier to influence the commission.<sup>323</sup> Now the coalition turned to getting the council to pay attention to the commission's report.<sup>324</sup> The commission's recommendations—including its most concrete proposal, the closure of Oak Hill—purposefully aligned with *Jerry M.*'s goal of transitioning to smaller, safer facilities designed for rehabilitation rather than warehousing.<sup>325</sup> At the coalition's urging, Councilmember Adrian Fenty introduced a bill based closely on the commission's recommendations.<sup>326</sup>

In the end, the commission's recommendations were a major influence on the bill that came out of committee.<sup>327</sup> Having set out to get tough in response to growing fears about youth crime, the council adopted a more balanced omnibus bill that required replacing the crumbling Oak Hill facility with a new, rehabilitation-oriented model.<sup>328</sup>

Again, Stuntz was right to describe surface politics as an “ebb and flow.”<sup>329</sup> The confluence of political factors that produced this legislative act was bound to change.<sup>330</sup> As Jerome Miller might have put it: Even if

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Attorney prosecutes all crimes except misdemeanors; the District's corporation counsel (since renamed the District's attorney general) brings delinquency petitions.

<sup>323</sup> The Justice for D.C. Youth Coalition consisted of national advocacy groups, including the Youth Law Center and the Justice Policy Institute, as well as local service organizations such as the Latin American Youth Center and the Alliance of Concerned Men. RYAN & SCHINDLER, *supra* note 208, at 10.

<sup>324</sup> One councilmember, apparently unaware of the Blue Ribbon Commission and its 2001 report, introduced a bill “[t]o establish a Juvenile Justice Task Force for the purpose of recommending improvements in the District of Columbia's criminal justice system as it applies to juveniles.” See Juvenile Justice Task Force Establishment Act of 2003, B. 15-573 (introduced by Councilmember Brazil).

<sup>325</sup> See BLUE RIBBON COMM'N, *supra* note 262, at 14–15 (framing the commission's recommendation to close Oak Hill as “a new rallying cry” to satisfy the city's obligations under the *Jerry M.* consent decree).

<sup>326</sup> Blue Ribbon Juvenile Justice and Youth Rehabilitation Act of 2004, B. 15-673 (introduced by Councilmember Fenty); see RYAN & SCHINDLER, *supra* note 208, at 10–11.

<sup>327</sup> RYAN & SCHINDLER, *supra* note 208, at 22. Councilmember Kathy Patterson, chair of the council's judiciary committee, made significant changes to the omnibus bill that tempered its punitive aspects and incorporated more of the commission's report. See REPORT ON BILL 15-527, *supra* note 322, at 9.

<sup>328</sup> See Omnibus Juvenile Justice Act of 2004, 52 D.C. Reg. 1188, D.C. Law 15-261 (effective Mar. 17, 2005) (codified at D.C. CODE § 24-941 (LexisNexis 2001)); REPORT ON BILL 15-527, *supra* note 322, at 16–21.

<sup>329</sup> Stuntz, *supra* note 306, at 510.

<sup>330</sup> For one, the union representing Oak Hill's correctional staff had no involvement in this debate. Later, the union would make its position on reforms clearly known. E.g., Elissa Silverman, *Brown Wins Endorsement of Union for Youth Jailers*, WASH. POST, Sept. 1, 2006,

surface politics can allow reform to begin, they will also ensure that sustained support for reform “will not be based on results, but will be a matter of chance, of happenstance, of politics and mood.”<sup>331</sup>

## 2. Deep Politics

In the surface-politics story of legislative responses to public opinion, *Jerry M.* had a quiet presence largely confined to the background. But from the perspective of deep politics, the lawsuit’s existence alters the power balance among the institutions of government. This rebalancing does not flow from the court’s orders, and its effect is noticeable even when the court does not order the legislature to take action.

The most obvious illustration of this effect is the legislature’s common and well-documented tendency to increase the budget of the target agency in an institutional reform lawsuit.<sup>332</sup> The District’s city council needed only a cursory reference to *Jerry M.* to approve budget increases for the youth corrections agency.<sup>333</sup> But what accounts for the legislature’s usual readiness to reward troubled agencies with additional resources?

Because its members are publicly accountable, a legislature seeks to avoid blame.<sup>334</sup> Conveniently, a legislature cannot be blamed for institutional reform litigation arising from faulty execution of the law. But when it appears that inadequate funding is a cause of the agency’s compliance problems, the legislature becomes exposed to a risk of blame.

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at B4 (reporting that the union representing line staff at Oak Hill endorsed Michael A. Brown in his campaign for mayor “because he supports its calls for the dismissal of department Director Vincent Schiraldi”).

<sup>331</sup> MILLER, *supra* note 6, at 226.

<sup>332</sup> See, e.g., Schlanger, *supra* note 89, at 562–63. With so many D.C. human services agencies operating under some form of court supervision, a leading local policy advocate counted the existence of a reform lawsuit as the first factor to consider when analyzing their proposed budgets. See Susie Cambria, *An Objective Tool to Assess the Mayor’s Budget and the Council’s Changes*, SUSIE’S BUDGET & POL’Y CORNER (Jan. 19, 2011), <http://susieCambria.blogspot.com/2011/01/objective-tool-to-assess-mayors-budget.html>.

<sup>333</sup> See, e.g., Fiscal Year 2005 Operating Cash Reserve Allocation Emergency Act of 2005, 52 D.C. Reg. 3162 (Apr. 1, 2005) (authorizing DYRS to spend, in addition to its approved annual budget, nearly \$3.3 million “to cover increased costs of court ordered requirements”). This supplemental funding increased DYRS’s \$51.7 million budget by about 6.4%. Cf. GOV’T OF D.C., 2 FY 2005 PROPOSED BUDGET AND FINANCIAL PLAN E-7 (June 21, 2004), available at [http://cfo.dc.gov/cfo/LIB/cfo/budget/2005/pdf/pbfp05\\_e\\_hss.pdf](http://cfo.dc.gov/cfo/LIB/cfo/budget/2005/pdf/pbfp05_e_hss.pdf) (using the term “Youth and Adolescent program” to refer to DYRS).

<sup>334</sup> See, e.g., SILVERSTEIN, *supra* note 113, at 3, 28–29 (illustrating policy approaches in other contexts that insulate legislative bodies from blame).

In that case, the legislature will typically perceive eliminating the risk of blame as worth the cost of giving the agency additional funding.<sup>335</sup>

As a practical matter, the court's involvement constrains the legislature's allocation of fiscal resources.<sup>336</sup> The lawsuit's constraint is akin to the constraints imposed by federal mandates, voter-imposed tax and expenditure limits, or economic down-cycles.<sup>337</sup> The legislature can perceive the constraint's existence whenever the agency says its funding is inadequate to comply with the decree—whether or not the court has gone so far as to specifically order additional appropriations.

Likewise, the *Jerry M.* court had not ordered the District to close Oak Hill when the council enacted its statutory mandate to do so; the idea came from the 2001 report of the Blue Ribbon Commission on Youth Safety and Juvenile Justice Reform.<sup>338</sup> But the participation of the commission's chairman, Judge Eugene Hamilton, gave the report an unmistakable judicial imprimatur.<sup>339</sup> Two years later, when surface politics prompted the council to do something about the youth-crime problem, the council stood exposed to blame if it ignored the commission's recommendations. The council's statutory mandate and the judiciary's perceived support for it left Mayor Williams with little room to maneuver; his next budget funded a \$34.2 million capital project to replace Oak Hill.<sup>340</sup>

However, in this deep politics story, the court's support for reform means more to the legislature and the executive than it does to the public. Early in *Jerry M.*'s history, it was clear that deinstitutionalization plans

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<sup>335</sup> When the additional funding would cause or exacerbate a fiscal crisis (i.e., any moment of acute resource scarcity requiring a reordering of major policy priorities), the cost becomes prohibitive and the legislature may not be moved to act. Thus, the court's involvement in *Jerry M.* had little budgetary impact during the District's period of fiscal insolvency from roughly 1993 to 2000; the city lacked both the money to fund priorities and the management capacity to order priorities.

<sup>336</sup> From the perspective of the legislature as a funding decisionmaker, this is a "first-order" constraint because the decision has been taken out of the legislature's hands and treated as a given. See GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES 19–21 (1978) (differentiating between first- and second-order changes).

<sup>337</sup> See, e.g., NAT'L CONFERENCE OF STATE LEGISLATURES, FUNDAMENTALS OF SOUND STATE BUDGETING PRACTICES, at ch. 2 (1995), available at <http://www.ncsl.org/issues-research/budget-tax/fundamentals-of-sound-state-budgeting-practices.aspx#constrain>.

<sup>338</sup> See *supra* text accompanying notes 319–28.

<sup>339</sup> Judge Hamilton was the chief judge of the D.C. Superior Court from 1993 until assuming senior status in 2000 after thirty years on the bench. Emily Langer & Keith L. Alexander, Obituary, *Judge Sat Atop D.C. Superior Court Bench*, WASH. POST, Nov. 21, 2011, at B6.

<sup>340</sup> COUNCIL OF D.C., COMM. ON HUMAN SERVS., *supra* note 198, at 15–16 & n.6; DALY ET AL., *supra* note 47, at 2 (referring to Oak Hill's closure in May 2009).



would face a major obstacle: NIMBY opposition from residents opposed to establishing group homes and other community-based alternatives to confinement in their neighborhoods, coupled with an absence of sparsely populated areas in such a compact city.<sup>341</sup> In an op-ed published in the *Washington Post*, three court-appointed experts sought to persuade the city's residents to accept group homes and troubled youths in their neighborhoods; so far as one can tell, their argument had absolutely no effect on public opinion.<sup>342</sup> Like any other political actor, the court's influence has potential and limits.

#### F. THE CHIEF EXECUTIVE

The difficulties agency managers face in obtaining reliable information about operations or issuing orders and having them executed are compounded at the chief executive level.<sup>343</sup> As a practical matter, a chief executive's role in juvenile corrections litigation is limited to only a few actions: selecting and supporting the director of the youth corrections agency.<sup>344</sup>

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<sup>341</sup> See, e.g., Virginia Mansfield, *Barry Says More Group Homes Will Open Throughout the City*, WASH. POST, Aug. 1, 1985, at DC1 (describing hostility in many neighborhoods to community-based placement of delinquent youths, prisoners, foster children, and people with mental illness or developmental disabilities). I embrace Lydia DePillis's descriptive (rather than pejorative) use of the label:

NIMBY: Not In My Back Yard. As in, "I don't object to this [homeless shelter/windmill/trash transfer station/Walmart/meth clinic] in *principle*, but I'd rather not have to deal with it in my neighborhood." That definition holds true even for the people who would add, "because my neighborhood is already a dumping ground for that kind of crap" or "it's just not the right place for that kind of thing."

Lydia DePillis, *What I Talk About When I Talk About NIMBYism*, WASH. CITY PAPER (Aug. 2, 2011, 6:29 PM), <http://www.washingtoncitypaper.com/blogs/housingcomplex/2011/08/02/what-i-talk-about-when-i-talk-about-nimbyism/> (brackets in original).

<sup>342</sup> See Marty Beyer, Robert E. Brown & Paul DeMuro, Op-Ed, *How to Help Delinquents Help Themselves*, WASH. POST, Oct. 18, 1987, at D8. The three coauthors were the members of the *Jerry M.* panel; see text accompanying *supra* note 27.

<sup>343</sup> See, e.g., NEUSTADT, *supra* note 139, at 34–35 (describing the institutional antagonism between a president and cabinet members, who respond to different constituencies).

<sup>344</sup> *Id.* at 7–8 (conceiving of the presidential role as that of a mere clerk, who labors to administer formalities (such as signing bills or executive orders) on behalf of the subordinate departments that actually perform work). On the distinction between labor and work, see ARENDT, *HUMAN CONDITION*, *supra* note 66, at 7, 144–152.

Depending on the circumstances, a chief executive might either welcome or resist an institutional reform lawsuit.<sup>345</sup> Newly elected executives are especially likely to embrace a lawsuit because doing so tends not to reflect poorly on their own administration's record.<sup>346</sup> But even an incumbent executive can find cooperating with the lawsuit advantageous.

In 1986, with Mayor Marion Barry facing a genuine challenge for a third term in office, one might have expected some hostility towards the *Jerry M.* plaintiffs from an administration keen to avoid negative news coverage of another lawsuit.<sup>347</sup> Instead, Mayor Barry was generally receptive to negotiating with plaintiffs.<sup>348</sup> The election provided an extra reason for him to negotiate a consent decree quickly, because a lengthy trial on juvenile corrections conditions would only "keep[] public attention focused on the problems of the city during the campaign season."<sup>349</sup> By 1989, when the *Jerry M.* court began fining the District for its contemptuous failure to comply with the decree, Barry felt free to openly deny the lawsuit's legitimacy.<sup>350</sup> Especially to the extent that these events destroyed the District's credibility with the court, the conduct of the first-generation chief executive, like that of the first-generation administrators,<sup>351</sup>

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<sup>345</sup> See Sabel & Simon, *supra* note 93, at 1062–63 (mentioning instances where elected executives, including D.C. Mayor Anthony Williams, conceded the deficiencies of public institutions and welcomed litigation as a means of correcting problems).

<sup>346</sup> *Id.* at 1063.

<sup>347</sup> At the time, many of the District's public care systems operated under court oversight. See Toni Locy, *In D.C., It's Often Government by Decree*, WASH. POST, Oct. 3, 1994, at A1 (stating that Barry's successor, Mayor Sharon Pratt (née Kelly), was confrontational and uncooperative towards institutional reform lawsuits generally).

<sup>348</sup> See *id.* (quoting Peter Nickles, whose work at the time included representation of plaintiffs in separate reform suits involving mental health and prison systems, assessing Barry's involvement). But cf. *id.* (stating that judges in the suits "have blamed the former mayor [Barry] for the deterioration of some city agencies, which hindered compliance with the decrees").

<sup>349</sup> Engel & Weiser, *supra* note 165, at B1. Barry went on to win reelection to a third four-year term, which was a disaster. See HARRY S. JAFFE & TOM SHERWOOD, *DREAM CITY: RACE, POWER, AND THE DECLINE OF WASHINGTON, D.C.* 176–199, 230–268 (1994) (chronicling Barry's out-of-control drug use during the 1986 campaign and his inattention to governing, culminating in his famous arrest in January 1989).

<sup>350</sup> Victoria Churchville, *D.C. Youth Service Chief Quits*, WASH. POST, June 8, 1989, at C1 ("We must not allow court orders to continue to supplant our own initiatives. What we must do is use creative management strategies to make youth services more cost-effective, more efficient and more accountable." (quoting a written statement issued by Barry)).

<sup>351</sup> Cf. *supra* Part IV.A.1 (profiling the District's first-generation administrators).

retains an outsized influence over the enduring lawsuit as it shifts to the implementation phase.<sup>352</sup>

Much later, Mayor Williams created his Blue Ribbon Commission on Youth Safety and Juvenile Justice Reform.<sup>353</sup> Mayor Williams's action aligned with his broader effort to reclaim the vast powers the District had lost to institutional reform lawsuits.<sup>354</sup> The commission took a broad view of its mandate and boldly recommended the closure of Oak Hill.<sup>355</sup> At least initially, the administration appeared to have more interest in ending the lawsuit than in extensive juvenile justice reform.<sup>356</sup> Still, the commission's recommendations retained an independent vitality; politically, the mayor could hardly oppose the city council's later effort to enact the commission's recommendations into law.<sup>357</sup>

As far as juvenile corrections litigation is concerned, the single most productive action a chief executive can take is the appointment of a capable agency director who will embrace and implement reform. So it is worth noting that the District only reluctantly hired Schiraldi; it first offered the

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<sup>352</sup> One might also conclude that the government's interest in managing long-term risks (such as the possibility that court supervision beginning in 1986 could continue through 2011 and beyond) is similar to its interest in caring for incarcerated youths, in that neither interest has an electorally important constituency.

<sup>353</sup> Williams created the commission at the urging of prominent Washington lawyer Charles F.C. Ruff, who had served as the District's corporation counsel in the mid-1990s. RYAN & SCHINDLER, *supra* note 208, at 8, 10.

<sup>354</sup> "Williams (D) has made the return of city agencies from judicial supervision to full local control a top goal of his administration." Sewell Chan, *Study Panel Backs Closing of Oak Hill*, WASH. POST, July 25, 2001, at B1 (disclosing that the Blue Ribbon Commission appointed by Mayor Williams would recommend closing Oak Hill, and quoting a deputy mayor's tentative statement that the administration "is open to all recommendations from the commission").

<sup>355</sup> The Annie E. Casey Foundation funded the commission's paid staff. RYAN & SCHINDLER, *supra* note 208, at 19–20. The commission's chair, Eugene N. Hamilton, was a former Chief Judge of the D.C. Superior Court; he described the commission's purpose as follows:

The vested interest in the existing system is one of the most substantial obstacles to change and improvement . . . . We're out looking for the best solutions for the children of the District of Columbia, a system that treats them in the most humane fashion during the time they're in the juvenile justice system and which is most preventive on the front end and most rehabilitative on the back end.

Chan, *supra* note 354, at B1–B4 (internal quotation marks omitted).

<sup>356</sup> See D.C. AFFAIRS SECTION OF THE D.C. BAR, STATEMENT IN SUPPORT OF THE BLUE RIBBON JUVENILE JUSTICE AND YOUTH REHABILITATION ACT OF 2004 (Mar. 17, 2004), available at [http://www.dcbbar.org/for\\_lawyers/sections/district\\_of\\_columbia\\_affairs/statements/juvenile.cfm](http://www.dcbbar.org/for_lawyers/sections/district_of_columbia_affairs/statements/juvenile.cfm) ("Nearly three years have elapsed and virtually none of the Commission's recommendations have been adopted.").

<sup>357</sup> See DALY ET AL., *supra* note 47, at 4–5.

job to three other candidates who were unlikely to attempt the reforms Schiraldi envisioned.<sup>358</sup> Finally, it must be remembered that the executive actions that most promoted reform are also examples in which events differed substantially from the executive's apparent intentions. By implication, the chief executive's control of the government is far more tenuous than theorists of institutional reform litigation commonly suppose.

#### G. EPILOGUE

This Comment's consideration of juvenile correctional reform in the District of Columbia has focused almost exclusively on conditions that led to the lawsuit and efforts to reform the system between 2005 and 2009. Both the judiciary and actors within the political branches are capable of advancing reform—but not without difficulty. However, the political branches are more likely than a court to second-guess their own support for reform. To underscore that point, this epilogue outlines the turbulent events of 2010, a year in which the agency's leadership disintegrated.

At the beginning of 2010, Schiraldi left DYRS to accept a job as director of prisons and probation in New York City.<sup>359</sup> Schiraldi was succeeded by his top aide, Marc Schindler, and the special arbiter commended the agency for a smooth leadership transition that sustained and in some respects improved the agency's performance.<sup>360</sup> But Schindler was appointed director on an interim basis, without being nominated for

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<sup>358</sup> See Michael Bochenek & Marc Schindler, Op-Ed, *Wrong Man for the Job*, WASH. POST, Oct. 26, 2003, at B8 (criticizing District officials who made Lamont Flanagan their top candidate, in light of his eleven-year record as director of the Baltimore City Jail); see also Theola Labbé, *Behind Oak Hill's Fences, Violence and Uncertainty*, WASH. POST, Aug. 2, 2004, at B1 (reporting the city administrator's statement that the District had sought unsuccessfully to lure Leonard Dixon from the juvenile detention center in Wayne County, Michigan). According to Marc Schindler, Jasper Ormond of the District's probation agency was also offered the job but declined.

Notably, a committee selected reformer Jerome Miller to lead the Massachusetts youth corrections agency, defying the governor's wishes. See MILLER, *supra* note 6, at 34 ("Governor Sargent bluntly told me I wasn't his first choice.").

<sup>359</sup> E.g., Editorial, *A D.C. Reformer Departs*, WASH. POST, Dec. 4, 2009, at A26 (noting that Schiraldi "was both hailed and vilified for his emphasis on rehabilitating, rather than confining, juveniles convicted of crimes" and recognizing that the agency had made both "dramatic improvements" and "serious missteps").

<sup>360</sup> The Special Arbiter's Report to the Court Regarding Defendants' Progress Toward Meeting Certain Requirements of the Revised Final Approved Amended Comprehensive Work Plan at 3, *Jerry M. v. District of Columbia*, C.A. No. 1519-85 (D.C. Super. Ct. July 8, 2010).

council confirmation.<sup>361</sup> Although Mayor Fenty “showed enormous resolve in backing Mr. Schiraldi,” Schindler’s interim status foreshadowed an erosion of political support for the agency’s rehabilitative approach to youth corrections.<sup>362</sup>

By the summer of 2010, the agency endured a storm of media criticism rivaling the exposures of the agency’s abuses in the 1980s. First, a tragic and brazen shooting, which killed three teenagers and injured six others, was initially linked to a teenager in DYRS custody who had run away from a community-based group home.<sup>363</sup> Though it was later proven that the teenager had no involvement in the shooting, media coverage of the incident severely damaged the agency’s reputation.<sup>364</sup> Later, three eighteen-year-old youths under DYRS supervision were charged with murdering the popular principal of a D.C. public school.<sup>365</sup> Finally, *Washington Post* columnist Colbert King demanded in frequent opinion pieces that DYRS stop coddling young offenders and return to a tougher approach.<sup>366</sup>

Despite the headlines, youth advocates, academics, and counsel to the *Jerry M.* plaintiffs each urged Fenty to nominate Schindler to lead the agency on an ongoing basis.<sup>367</sup> But Peter Nickles, the District’s attorney general and a longtime Fenty confidant, soured on DYRS management and its perceived laxity toward youths, according to a memo he wrote that was highly critical of the agency.<sup>368</sup>

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<sup>361</sup> Mayor’s Order 2010-23, Appointment: Interim Director, Department of Youth Rehabilitation Services, 57 D.C. Reg. 1275 (Feb. 5, 2010).

<sup>362</sup> Editorial, *A D.C. Reformer Departs*, *supra* note 359, at A26.

<sup>363</sup> The news media published extensive coverage of the shooting, including the *Washington Post*’s two-part, front-page series. See Paul Duggan, *Nine Days: The Story Behind the Southeast Shootings*, WASH. POST, June 3, 2010, at A1; Paul Duggan, *Steely Determination, Deadly Retaliation*, WASH. POST, June 4, 2010, at A1.

<sup>364</sup> See, e.g., Henri Cauvin, *Fenty Picks New Chief of Juvenile Justice*, WASH. POST, July 20, 2010, at B1.

<sup>365</sup> Editorial, *A Shrouded Justice System: Betts Murder Raises Questions About How D.C., Courts Handle Young Offenders*, WASH. POST, May 7, 2010, at A26.

<sup>366</sup> See, e.g., sources cited *supra* notes 153 & 284.

<sup>367</sup> See, e.g., Cauvin, *supra* note 364, at B1 (referring to Schindler’s supporters outside the administration); Testimony of Peter Edelman before the D.C. Council, Committee on Human Services, June 14, 2010 (on file with the author); Letter from Alan A. Pemberton, attorney, Covington & Burling, LLP to Adrian Fenty, Mayor, D.C. (June 22, 2010) (on file with the author) (“On behalf of Plaintiffs’ counsel in the *Jerry M.* case, I write to urge you to appoint Marc Schindler as the permanent director of DYRS. He has our unequivocal support.”).

<sup>368</sup> See PETER J. NICKLES, MEMORANDUM TO HON. ADRIAN M. FENTY, MAYOR, REVIEW OF DYRS RECORDS REGARDING COMMITTED YOUTH ARRESTED FOR MURDER OR ASSAULT WITH INTENT TO MURDER IN 2009–2010, at 6 (May 20, 2010) available at [http://voices.washingtonpost.com/debonis/dyrs\\_report\\_oag.pdf](http://voices.washingtonpost.com/debonis/dyrs_report_oag.pdf) (examining fewer than two

Finally, Fenty fired Schindler and replaced him with Robert Hildum, a prosecutor who believed that New Beginnings was much too small and that more youths should be confined in locked custody.<sup>369</sup> Two of DYRS's top managers immediately resigned.<sup>370</sup>

The abrupt firing of Schindler occurred at a time when Fenty's campaign for reelection sputtered.<sup>371</sup> There is circumstantial evidence that Fenty's campaign strategy to win the *Washington Post's* support influenced his decision to fire Schindler. As the election grew closer, Fenty's electoral hopes increasingly relied on receiving overwhelming support from white and affluent neighborhoods, where the *Washington Post's* endorsement is believed to carry the greatest weight.<sup>372</sup> Alternatively (or simultaneously), Fenty may have concluded from accounts such as Nickles's memo that a change in policy or personnel was needed.

In either case, Fenty fired Schindler the day before meeting with the *Post* editorial board to seek the newspaper's endorsement.<sup>373</sup> Columnist King quickly praised Schindler's dismissal in a *Post* op-ed, concluding: "I've written more than 30 columns critical of DYRS since 2007. Fenty can't say he wasn't warned. Credit him with finally acting."<sup>374</sup> The same column referenced Nickles's memo and explained, "Fenty was confronted

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dozen cases and concluding that "systemic" problems "seem to be related to a lack of supervision, guidance, documentation, and overall management of the DYRS program"); cf. DEP'T OF YOUTH REHAB. SERVS. (D.C.), UNDATED MEMORANDA ADDRESSING THE REPORT'S METHODOLOGY AND CORRECTING THE REPORT'S FACTUAL MISSTATEMENTS, *available at* [http://voices.washingtonpost.com/debonis/dyrs\\_response.pdf](http://voices.washingtonpost.com/debonis/dyrs_response.pdf).

<sup>369</sup> See, e.g., Cauvin, *supra* note 364, at B1; Jeffrey Anderson & Matthew Cella, 'Anti-Prison' at Root of DYRS Problems, WASH. TIMES (Nov. 21, 2010), <http://www.washingtontimes.com/news/2010/nov/21/anti-prison-at-root-of-dyrs-problems/?page=all> (quoting Hildum).

<sup>370</sup> E.g., Cauvin, *supra* note 364, at B1.

<sup>371</sup> Mike DeBonis, Analysis, *After '06 Landslide, an Apparent Reversal*, WASH. POST, Aug. 30, 2010, at B1. Although public confidence in government performance reached record highs, a large portion of the District's residents, especially in the black community, perceived Fenty as aloof. *Id.*

<sup>372</sup> *Id.*; see Alan Suderman, *Posting Up*, WASH. CITY PAPER (Dec. 14, 2011, 6:24 PM), <http://www.washingtoncitypaper.com/blogs/looselips/2011/12/14/posting-up/> (supposing that the city's richest, whitest ward "is probably home to the most *Post* editorial readers").

<sup>373</sup> See Mike DeBonis, *DeMorning DeBonis: July 21, 2010*, WASH. POST (July 21, 2010, 1:00 PM), [http://voices.washingtonpost.com/debonis/2010/07/demorning\\_debonis\\_july\\_21\\_2010.html](http://voices.washingtonpost.com/debonis/2010/07/demorning_debonis_july_21_2010.html) (stating that Fenty met with the editorial board on July 20).

<sup>374</sup> Colbert I. King, Op-Ed, *D.C.'s Long-Overdue Juvenile Justice Shakeup*, WASH. POST, July 24, 2010, at A13. ("Woefully misinformed are those who claim that Mayor Adrian Fenty's removal this week of Marc Schindler as interim director of the Department of Youth Rehabilitation Services, and the departure of two Schindler deputies, are a setback for juvenile reforms.").

with overwhelming evidence of serious and recurring DYRS management problems that threaten public safety. He reacted, as a chief executive should.”<sup>375</sup> Fenty indeed received the *Post*’s endorsement, but it was not enough to save the campaign.<sup>376</sup>

The new mayor, Vincent Gray, chose not to retain Hildum; instead he nominated Neil Stanley, the DYRS general counsel, to run the agency.<sup>377</sup> So far, Stanley has expressed support for a more careful balance of rehabilitation and discipline.<sup>378</sup> For his part, King has continued to rail against leniency towards delinquent youths and pilloried Stanley as “Vinny Schiraldi-lite.”<sup>379</sup> In a public hearing, the new chairman of the committee overseeing DYRS complained that the agency provided a “rest home for young thugs.”<sup>380</sup> Despite testimony in support of Stanley’s nomination from the *Jerry M.* plaintiffs’ counsel, the committee recommended disapproving it and the nomination ultimately was “deemed approved” without action by the full council.<sup>381</sup>

From here, the District’s juvenile justice reforms can persist, stall, or regress. This Part has shown that elected officials and their appointees can make great changes in this field—in other words, that political actors can drive reform.<sup>382</sup> But political success can be fragile.

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<sup>375</sup> *Id.*

<sup>376</sup> Tim Craig & Nikita Stewart, *D.C. Mayor’s Race: Voters Appear to Embrace Conciliatory Style of Governing*, WASH. POST, Sept. 15, 2010, at A1; Editorial, *A Vote for Adrian Fenty*, WASH. POST, Aug. 1, 2010, at A18; see also Fred Hiatt, Op-Ed, *How We Endorse, and Why*, WASH. POST, Sept. 11, 2006, at A17 (mentioning King’s important role on the editorial board with respect to District election endorsements).

<sup>377</sup> See Director of the Department of Youth Rehabilitation Services Neil A. Stanley Confirmation Resolution of 2011, P.R. 19-128 (introduced Mar. 22, 2011) (on file with the author) (introduced at the mayor’s request).

<sup>378</sup> See Tom Howell Jr., *DYRS Hearing Probes Agency’s Internal Friction*, WASH. TIMES (May 7, 2011), <http://www.washingtontimes.com/news/2011/may/7/dyrs-hearing-probes-agencys-internal-friction/>.

<sup>379</sup> Colbert I. King, *With New Beginnings, Same Old DYRS*, WASH. POST, June 3, 2011, at A13.

<sup>380</sup> Howell, *supra* note 378 (quoting Councilmember Jim Graham).

<sup>381</sup> See COUNCIL OF D.C., COMM. ON HUMAN SERVS., REPORT ON P.R. 19-128, at 1–2 (July 8, 2011).

<sup>382</sup> The Missouri Division of Youth Services has built and maintained the nation’s model juvenile justice system while “sustain[ing] political support for nearly three decades under governors from both political parties—including tough-on-crime conservatives such as former U.S. Attorney General John Ashcroft, who served as Missouri’s governor from 1985–93.” MENDEL, MISSOURI MODEL, *supra* note 9, at 12.

## V. CONCLUSION

This Comment tells the story of a consent decree that could not by itself fix a broken system. What does it mean for the court and the parties in a future juvenile corrections lawsuit?

When adjudicating a single delinquency case, the conscientious juvenile court judge seeks to understand why a youth has offended and how he can be rehabilitated.<sup>383</sup> So it would be natural for the *Jerry M.* court to closely oversee compliance with a highly detailed consent decree, as if the defendant's rehabilitation is complete when the defendant complies with each term of the decree. That judicial effort was admirable, but it was not effective.

Instead of treating the law-breaking government like a delinquent child, a better approach would treat the law-breaking government as a fully capable adult who ought to act responsibly. That means a consent decree should be focused, setting the fewest possible requirements needed to fulfill the constitutional and statutory rights of the youths in the agency's care. A responsible government agency figures out on its own how to do its work.

What would this look like in practice? One contemporary remedial injunction is a model of simplicity. In *Brown v. Plata*, after a consent decree failed to bring about the desired changes, the plaintiffs and the court required California to meet a population cap to satisfy the inmates' Eighth Amendment right to medical care.<sup>384</sup> But the parties resisted the temptation to dictate *how* the state must satisfy the target.<sup>385</sup> The injunction focuses on a single, clearly defined result and preserves the defendants' flexibility in meeting it.

This minimalist approach can be tailored to meet an agency's most fundamental problem—even one that is difficult to quantify, such as a lack of effective leadership. It may simply be exceedingly rare for a chief executive to choose and stand behind a true reformer in the mold of a Mark Steward, Jerome Miller, or Vincent Schiraldi.<sup>386</sup> A remedial injunction, then, can assign the plaintiffs an advice-and-consent power over any prospective nominee to run the agency; that is, it can bind the chief executive to obtain the plaintiffs' consent to the selection of an agency head before the chief executive sends the nomination to the legislature for its own advice and consent.

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<sup>383</sup> See Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107 (1909).

<sup>384</sup> *Brown v. Plata*, 131 S. Ct. 1910, 1922, 1923 (2011) (describing the population cap imposed by a three-judge panel convened pursuant to the PLRA).

<sup>385</sup> *Id.* at 1940–41.

<sup>386</sup> See *supra* text accompanying notes 358–75.



Such an injunction would give the plaintiffs a substantial amount of leverage, installing them as a selection committee over future appointments. But it need not grant the plaintiffs a removal power; instead, the plaintiffs would have to live with the person they approved, just as the executive must. At the same time, the looming presence of the plaintiffs would insure against an executive's removal of a capable, reform-minded director.

In one sense, this is a radical proposal. Yet to adhere to a highly detailed approach that has engendered frustration for decades would be to expect "an unwarranted triumph of hope over experience."<sup>387</sup>

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<sup>387</sup> LaShawn A. *ex rel.* Moore v. Fenty, 701 F. Supp. 2d 84, 115 (D.D.C. 2010) (scolding the District for seeking to terminate an institutional reform lawsuit in child welfare).